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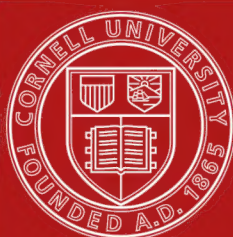
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CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

By **WILLIAM MEADE FLETCHER**
Author of "Corporation Forms," "Illinois Corporations," "Equity
Pleading and Practice," etc.

VOLUME IX

CHICAGO
CALLAGHAN AND COMPANY
1920

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[For forms relative to this topic, see Fletcher's Corporation Forms.]

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XIII. STATUTES AND CONSTITUTIONAL PROVISIONS IMPOSING CONDITIONS AND RESTRICTIONS UPON FOREIGN CORPORATIONS

§ 5894. **In general.** As has been seen elsewhere, while a corporation may be recognized and permitted to exercise its powers in another state than that by which it was created, this is not a matter of absolute right, but depends upon the express or implied consent of the other state, and it is a matter of comity. It is well settled,

therefore, that a state may exclude a foreign corporation altogether from doing business or acquiring property within its limits, or it may impose any conditions or restrictions which it may see fit to impose, provided it does not thereby violate any provision of its own constitution or of the Constitution of the United States.³⁵

All of the states have enacted legislation in respect to foreign corporations doing business or acquiring property within their respective limits, but no state has excluded a foreign corporation altogether from doing business or acquiring property within its limits. Constitutional provisions relative to the doing of business in the state by foreign corporations are frequently found, but the specific regulation of such bodies is usually found in the statutes. Many of these statutes are of the same general character and seek to attain the same end, and require a foreign corporation doing business in the state to file a copy of its charter or articles of incorporation, and designate an agent upon whom service of process may be made in any action or proceeding to which the corporation may be a party, and provide that service of process upon such agent shall be due and personal service upon the corporation. Some of the statutes also require the foreign corporation to have a known and established place of business within the state. And in some of the states the filing of elaborate, and frequently inquisitive and burdensome, reports setting forth the financial condition, method in which the capital stock has been paid in, and other details in reference to the corporate organization and management, are required to be filed. The payment of a license fee for the privilege of doing business is also a frequent requirement. The statutes are too variant in their provisions to attempt any classification thereof in respect to the states, and as they are in many instances frequently changed by the legislature, it would not be within the purpose of this work to set them out in extenso. Some of them are relatively simple in their requirements, while others are more drastic, but all of them usually embody one or more of the requirements which will be considered specifically in the following sections. The penalties imposed for failure to comply with the statutory requirements are likewise variant, and are also frequently changed, but they may be grouped under certain heads, as will be seen hereafter. It is much to be regretted that a uniform statute in reference to foreign corporations doing business in the state cannot be adopted by the several states, for the varied requirements of the different statutes and the conflict of views entertained by the courts in

³⁵ See §§ 5734-5751, *supra*.

respect to the meaning to be given to such statutes is a source of continual embarrassment to corporations whose business ramifications extend throughout the country.³⁶

Territorial legislatures under their general legislative powers may exclude foreign corporations from, or impose conditions upon their doing business within, their territorial limits.³⁷

§ 5895. Motive for exclusion immaterial. The power of a state to exclude foreign corporations from doing business or exercising any of their powers within the state is absolute, and its motives in doing so, or the means by which it does so, are entirely immaterial,³⁸ so long as no constitutional provision is violated.³⁹

³⁶ Consult the statutes of the respective states.

"It was said in the case of *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. loc. cit. 422, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, that the purpose of our statutes is to place foreign corporations on an equality with domestic corporations, and to impose the same burdens upon them that domestic corporations have to bear. To entitle a domestic corporation to do the business the plaintiff was doing, it must have become incorporated and paid the state an incorporation tax, and to be placed on the same footing, when engaged in the same business, a foreign corporation must do the same. Domestic corporations have an office and officers upon whom service of process may be had in case they breach their contracts in doing business in Missouri, and so is the requirement as to foreign corporations. And it is said in that case that it was to prevent the happening of such contingencies that the statutes in question were principally enacted. It is held in the case of *Parke, Davis & Co. v. Mullett*, 245 Mo. loc. cit. 176, 149 S. W. 461, that the regulation of foreign corporations is for the purpose of subjecting them to inspection, so that

their condition might be known; further, that there be a protection to the public in subjecting foreign corporations doing business in this state to the jurisdiction of the courts of the state, and that the providing of revenue is merely incidental." *Wichita Film & Supply Co. v. Yale*, 194 Mo. App. 60, 184 S. W. 119.

³⁷ *Empire Milling & Mining Co. v. Tombstone Milling & Mining Co.*, 100 Fed. 910. See § 5734, *supra*.

³⁸ *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 6 Ann. Cas. 317; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *State v. New York Life Ins. Co.*, 119 Ark. 314, 173 S. W. 1099, 171 S. W. 871; *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692. See §§ 5734-5751, *supra*.

³⁹ See §§ 5734-5751, *supra*.

As said by the Supreme Court of the United States, "As a state has power to refuse permission to a foreign insurance company to do business at all within its confines and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial. * * * A state has power to prevent a company from coming into its domain, and * * *

§ 5896. **Unreasonableness of statute immaterial.** It necessarily follows from the power which a state possesses in reference to excluding foreign corporations, other than those which fall within the excepted classes,⁴⁰ or of imposing conditions upon their doing business in the state, that a statute excluding foreign corporations or imposing conditions upon their right to do business within the state cannot be attacked on the ground that it is unreasonable, and the court must give it effect according to its terms, if it violates no constitutional prohibition. A court cannot refuse to enforce such a statute on the ground that the conditions imposed are unreasonable or oppressive. The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of the legislature.⁴¹

The rule is otherwise where compliance with the statute creates a contract between the foreign corporation and the state that such corporation shall have the right to do business in the state during a prescribed period on certain conditions. In such circumstances the state has no power to impose additional burdens upon such corporation, as to do so would impair the obligations of such contract.⁴² Although a state may, when its action does not amount to an interference with interstate commerce, exclude foreign corporations from its territory, yet when the laws of the state provide for their admission, and a corporation complies with those regulations and pays

has power to take away its right to remain after having once been permitted to enter, and that right may be exercised from good or bad motives." *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 6 Ann. Cas. 317.

⁴⁰ See §§ 5753, 5762-5784, *supra*.

⁴¹ **United States.** *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552, *aff'g* 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, 38 S. W. 85; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Standard Home Co. v. Davis*, 217 Fed. 904; *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711.

Michigan. *Hartford Fire Ins. Co.*

v. Raymond, 70 Mich. 485, 38 N. W. 474.

Missouri. *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638, 38 S. W. 85, *aff'd* 172 U. S. 557, 43 L. Ed. 552.

New York. *People v. Fire Ass'n of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380, *aff'd* 119 U. S. 110, 30 L. Ed. 342.

Ohio. *Western U. Tel. Co. v. Mayer*, 28 Ohio St. 521.

Wisconsin. *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904; *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

See §§ 5742-5751, 5752-5773, *supra*.

⁴² *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 51 L. Ed. 393, *rev'g* 34 Colo. 240, 82 Pac. 531. See § 5757, *supra*.

the required fee, it secures from the state a franchise to transact business therein.⁴³

§ 5897. Constitutional provisions self-executing. In some jurisdictions there are constitutional provisions excluding foreign corporations from doing business in the state or imposing certain conditions on their right to do business, as, for example, that they shall have a known place of business in the state and a resident agent for the service of process, etc. It has been questioned whether or not such provisions are self-executing, but it is settled that such constitutional provision is self-executing if it is complete in itself and requires no statute to give it practical operation.⁴⁴

§ 5898. Statutes restricting the business of foreign corporations to particular localities. While the power is seldom, if ever, exercised, it is competent for a state, in granting the foreign corporations the privilege of transacting business within its limits, to restrict their business to particular localities.⁴⁵

§ 5899. Statutes requiring filing of copy of its charter. Many of the states require a foreign corporation to file a properly authenticated copy of its charter or articles of incorporation in a designated office or offices as a condition prerequisite to the right to do busi-

⁴³ State v. Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

⁴⁴ New England Mortg. Security Co. v. Ingram, 91 Ala. 337, 9 So. 140; Christian v. American Freehold Land & Mortgage Co., 89 Ala. 198, 7 So. 427; Farrior v. New England Mortgage & Security Co., 88 Ala. 275, 7 So. 200; Dudley v. Collier, 87 Ala. 431, 13 Am. St. Rep. 55, 6 So. 304; Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; Beard v. Union & A. Pub. Co., 71 Ala. 60; American U. Tel. Co. v. Western U. Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Katz v. Herriek, 12 Idaho 1, 86 Pac. 873.

The provision of the Constitution of Idaho that no foreign corporation shall do business in that state without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served, is held to be

self-acting and self-operative to the extent that it requires the facts therein enumerated to actually exist at the time such corporation begins to transact business within the state. The people by adopting such provision "clearly announced and proclaimed the policy of the state toward foreign corporations, and have said in unmistakable language that such artificial beings, existing only by the will of a foreign state, must subject themselves to the jurisdiction and laws of this state before they can have recognition or legal existence within its borders." Katz v. Herriek, 12 Idaho 1, 86 Pac. 873.

⁴⁵ Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Humphreys v. State, 70 Ohio St. 67, 65 L. R. A. 776, 101 Am. St. Rep. 883, 1 Ann. Cas. 233, 70 N. E. 957. See §§ 5734-5751, *supra*.

ness in the state.⁴⁶ Such statutory requirement comes within the power of the state to exclude foreign corporations from doing busi-

46 United States. Hammer v. Garfield Mining & Milling Co., 130 U. S. 291, 32 L. Ed. 964; Black v. Caldwell, 83 Fed. 880.

Alabama. Armour Packing Co. of Louisiana v. Vinegar Bend Lumber Co., 149 Ala. 205, 13 Ann. Cas. 951, 42 So. 866.

Arizona. Industrial Building & Loan Ass'n v. Meyers-Abel Co., 12 Ariz. 48, 95 Pac. 115.

Arkansas. London & L. Fire Ins. Co. v. Ludwig, 86 Ark. 581, 112 S. W. 197; Western U. Tel. Co. v. State, 82 Ark. 309, 101 S. W. 745; Sutherland-Innes Co. v. Chaney, 72 Ark. 327, 80 S. W. 152; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572.

California. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 Pac. 426; Keystone Driller Co. v. San Francisco Superior Court, 138 Cal. 738, 72 Pac. 398; South Yuba Water & Mining Co. v. Rosa, 80 Cal. 333, 22 Pac. 222.

Colorado. Cockburn v. Kinsley, 25 Colo. App. 89, 135 Pac. 1112.

Idaho. Dickens-West Min. Co. v. Crescent Mining & Milling Co., 26 Idaho 153, 141 Pac. 566; Pennsylvania-Coeur D'Alene Min. Co. v. Gallagher, 19 Idaho 101, 112 Pac. 1044; Katz v. Herrick, 12 Idaho 1, 86 Pac. 873; Belle City Mfg. Co. v. Frizzell, 11 Idaho 1, 81 Pac. 58.

Illinois. Union Cloak & Suit Co. v. Carpenter, 102 Ill. App. 339; Richardson v. United States Mortgage & Trust Co., 89 Ill. App. 670, aff'd 194 Ill. 259, 62 N. E. 606.

Indiana. American Ins. Co. v. Butler, 70 Ind. 1.

Iowa. State v. Chicago, M. & St. P. Ry. Co., 80 Iowa 586, 46 N. W. 741.

Kentucky. Com. v. Read Phosphate Co., 113 Ky. 32, 67 S. W. 45.

Michigan. Hoskins v. Rochester Savings & Loan Ass'n, 133 Mich. 505, 95 N. W. 566.

Minnesota. State v. Sioux City & N. R. Co., 43 Minn. 17, 44 N. W. 1032.

Missouri. Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344, rev'g 101 Mo. App. 569, 74 S. W. 128; Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720, 139 S. W. 525; Fay Fruit Co. v. McKinney Bros. & Co., 103 Mo. App. 304, 77 S. W. 160; Frick Co. v. Marshall, 86 Mo. App. 463; Maxwell & Co. v. Edens, 65 Mo. App. 439; Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co., 60 Mo. App. 148.

Montana. Manhattan Trust Co. v. Davis, 23 Mont. 273, 58 Pac. 718; State v. Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Nebraska. Holt v. Rust-Owen Lumber Co., 2 Neb. (Unoff.) 170, 96 N. W. 613.

Nevada. Evans v. Lee, 11 Nev. 194.

New Jersey. Wolf v. Lancaster, 70 N. J. L. 201, 56 Atl. 172; Manhattan & S. Savings & Loan Ass'n v. Massarelli (N. J. Ch.), 42 Atl. 284.

North Dakota. National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285.

Pennsylvania. Delaware River Quarry & Construction Co. v. Bethlehem & N. Passenger R. Co., 204 Pa. 22, 53 Atl. 533.

South Carolina. Geraty v. Atlantic Coast Line R. Co., 80 S. C. 355, 60 S. E. 936; State v. Tompkins, 48 S. C. 49, 25 S. E. 982.

South Dakota. Thompson v. Juve & Seroyer, 20 S. D. 72, 104 N. W. 854; Bishop & Babcock Co. v. Schleuning, 20 S. D. 71, 104 N. W. 854; Iowa

ness within its limits or impose such restrictions upon them as it may see fit, unless the corporation is engaged in interstate or foreign commerce or is in the employ of the federal government.⁴⁷ A statute requiring foreign corporations, before doing any business in the state, to file in the office of the secretary of state and in the office of the county recorder of the county wherein they intend to carry on or transact business a duly authenticated copy of their charter or certificate of incorporation and also a statement showing the name of the corporation and the location of its principal office or place of business out of the state, and if it is to have a place of business or principal office within the state, the location thereof, does not require the copy of the certificate to be filed in every county in the state wherein it intends to carry on business, but only in the county wherein the corporation has its principal office or place of business.⁴⁸

§ 5900. Statutes requiring payment of license fee or tax. The payment by a foreign corporation of a certain license fee or tax, as a condition of the right to do business or make contracts within the

Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449.

Tennessee. Clark v. Memphis St. Ry. Co., 123 Tenn. 232, 130 S. W. 751; Nichols & Shepherd Co. v. Loyd, 111 Tenn. 145, 76 S. W. 911; United States Savings & Loan Co. v. Miller (Tenn.), 47 S. W. 17.

Texas. Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22, rev'g Delaware Ins. Co. v. Security Co. (Tex. Civ. App.), 54 S. W. 916; Texas & P. Ry. Co. v. Davis, 93 Tex. 378, 55 S. W. 562, rev'g 54 S. W. 381; Miller v. Goodman, 91 Tex. 41, 40 S. W. 718; King v. Monitor Drill Co. (Tex. Civ. App.), 92 S. W. 1046; St. Louis Expanded Metal Fire-Proofing Co. v. Beilhartz (Tex. Civ. App.), 88 S. W. 512; Eskridge v. Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Whitley v. General Elec. Co., 18 Tex. Civ. App. 674, 45 S. W. 959; Southern Building & Loan Ass'n v. Skinner (Tex. Civ. App.), 42 S. W.

320; Western Paper Bag Co. v. Johnson (Tex. Civ. App.), 38 S. W. 364; Huffman v. Western Mortg. & Inv. Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

Utah. A. Booth & Co. v. Weigand, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g 28 Utah 372, 79 Pac. 570.

Washington. Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327.

Wisconsin. Elwell v. Adder Mach. Co., 136 Wis. 82, 116 N. W. 882.

⁴⁷ Western U. Tel. Co. v. State, 82 Ark. 309, 101 S. W. 745; Huffman v. Western Mortg. & Inv. Co., 13 Tex. Civ. App. 169, 36 S. W. 306; Rio Grande Western Ry. Co. v. Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995. See also cases cited in preceding note and §§ 5753, 5762-5784, *supra*.

⁴⁸ Black v. Caldwell, 83 Fed. 880; Manhattan Trust Co. v. Davis, 23 Mont. 273, 58 Pac. 718.

state, is a frequent requirement of statutes of this character. It is well settled that a state may require a foreign insurance company or other corporation to pay such license fee or tax, as a condition of the right to do business and make contracts within the state, although no such fee or tax, or a less one,⁴⁹ may be exacted from its

49 United States. American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 393; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025; Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Dalton Adding Mach. Co. v. Virginia State Corporation Commission, 213 Fed. 889; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1; Oakland Sugar Miller Co. v. Fred W. Wolf Co., 118 Fed. 239; Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711; Southern Cotton Oil Co. v. Wemple, 44 Fed. 24.

Alabama. Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238, 14 So. 581.

Arkansas. Phoenix Assur. Co. v. Ludwig, 87 Ark. 465, 113 S. W. 34; Western U. Tel. Co. v. State, 82 Ark. 309, 101 S. W. 745.

California. See H. K. Mulford Co. v. Curry, 163 Cal. 176, 125 Pac. 236, holding a license tax unconstitutional.

Colorado. American Smelting & Refining Co. v. Colorado, 34 Colo. 240, 82 Pac. 531, aff'd 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978.

Georgia. Goldsmith v. Home Ins. Co., 62 Ga. 379.

Illinois. State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814; Home Ins. Co. v. Swigert, 104 Ill. 653; Walker v. Springfield, 94 Ill. 364; Western U. Tel. Co. v. Lieb, 76 Ill.

172; Ducat v. Chicago, 48 Ill. 172, 95 Am. Dec. 529, aff'd 10 Wall. (U. S.) 410, 19 L. Ed. 972.

Indiana. State v. Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574.

Iowa. Scottish Union & National Ins. Co. of Edinburgh, Scotland and London, England v. Herriott, 109 Iowa 606, 77 Am. St. Rep. 548, 80 N. W. 665.

Kansas. Cudahy Packing Co. v. Denton, 79 Kan. 368, 97 Pac. 439, 99 Pac. 601; Phoenix Ins. Co. v. Welch, 29 Kan. 672.

Kentucky. Southern Building & Loan Ass'n v. Norman, 98 Ky. 294, 31 L. R. A. 41, 56 Am. St. Rep. 367, 32 S. W. 952; Woodward v. Com., 9 Ky. L. Rep. 670, 7 S. W. 613; Com. v. Milton, 12 B. Mon. 212, 54 Am. Dec. 522; Phoenix Ins. Co. v. Com., 5 Bush 68, 96 Am. Dec. 331.

Louisiana. State v. Hammond Packing Co., 110 La. 180, 98 Am. St. Rep. 459, 34 So. 368; State v. Liverpool, L. & G. Ins. Co., 40 La. Ann. 463, 4 So. 504; State v. Fosdick, 21 La. Ann. 434; State v. Lathrop, 10 La. Ann. 398.

Massachusetts. Attorney General v. Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 117; Blackstone Mfg. Co. v. Inhabitants of Blackstone, 13 Gray 488.

Michigan. Warren-Scharf Asphalt Pav. Co. v. Secretary of State, 115 Mich. 264, 73 N. W. 107; Moline Plow Co. v. Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Minnesota. State v. Schmahl, 133 Minn. 175, 157 N. W. 1082; State v.

own corporations engaged in the same business, provided, of course,

Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

Mississippi. Postal Tel. Cable Co. v. Adams, 71 Miss. 555, 42 Am. St. Rep. 476, 14 So. 36.

Missouri. State v. Cook, 171 Mo. 348, 71 S. W. 829; Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720, 139 S. W. 525.

Montana. State v. Rocky Mountain Bell Telephone Co., 27 Mont. 394, 71 Pac. 311.

Nebraska. State v. Insurance Co. of North America, 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767; State v. Fleming, 70 Neb. 523, 529, 97 N. W. 1063.

New Jersey. State v. Berry, 52 N. J. L. 308, 19 Atl. 665; Tatem v. Wright, 23 N. J. L. 429. Compare Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226.

New York. People v. Sohmer, 206 N. Y. 634, 99 N. E. 1115, aff'g 148 App. Div. 514, 132 N. Y. Supp. 789; People v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 542, 29 N. E. 1002; Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; People v. Equitable Trust Co., 96 N. Y. 387; People v. Fire Ass'n of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Hoevel Sandblast Mach. Co. v. Hoevel, 167 App. Div. 548, 153 N. Y. Supp. 35; Portland Co. v. Hall & Grant Const. Co., 121 App. Div. 779, 106 N. Y. Supp. 649, rehearing granted 123 App. Div. 495, 108 N. Y. Supp. 821; People v. Miller, 105 App. Div. 326, 94 N. Y. Supp. 193; People v. Kelsey, 105 App. Div. 175, 93 N. Y. Supp. 369, aff'd 182 N. Y. 526, 74 N. E. 1123; People v. Miller, 90 App. Div. 560, 86 N. Y. Supp. 386, aff'd 182 N. Y. 521, 74 N. E. 1124; People v. Miller, 90 App. Div. 545, 85 N. Y. Supp. 849; Seibert v. Dunn, 70 Misc. 422, 126 N. Y. Supp. 974, 157 App.

Div. 387, 142 N. Y. Supp. 253; Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836; Boston Manufacturer's Mut. Fire Ins. Co. v. Hendricks, 41 Misc. 479, 85 N. Y. Supp. 44; Fire Department v. Wright, 3 E. D. Smith 453.

North Carolina. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Ohio. Western U. Tel. Co. v. Mayer, 28 Ohio St. 521.

Oregon. Hirschfeld v. McCullagh, 64 Ore. 502, 130 Pac. 1131, 127 Pac. 541.

Pennsylvania. Com. v. New York, L. E. & W. R. Co., 139 Pa. St. 457, 21 Atl. 528; Com. v. New York, L. E. & W. R. Co., 129 Pa. St. 463, 15 Am. St. Rep. 724, 18 Atl. 412; Com. v. Standard Oil Co., 101 Pa. St. 119; Germania Life Ins. Co. v. Com., 85 Pa. St. 513.

Tennessee. State v. Phoenix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

Virginia. Dalton Adding Mach. Co. v. Com., 118 Va. 563, 88 S. E. 167; Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390; American Surety Co. v. Com., 102 Va. 841, 47 S. E. 994; Postal Tel. Cable Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; Slaughter v. Com., 13 Gratt. 767.

Washington. State v. Superior Court, Pierce County, 42 Wash. 675, 85 Pac. 669; Chehalis Boom Co. v. Chehalis County, 24 Wash. 135, 63 Pac. 1123. See Boston Tow Boat Co. v. John J. Sesnon Co., 64 Wash. 375, 116 Pac. 1083, construing Wash. Laws 1907, c. 140, § 7, providing that no foreign corporation "shall be permitted to maintain any suit without alleging and proving that it has paid its annual license fee last due."

West Virginia. Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514.

Wisconsin. State v. Leuch, 156

it does not thereby violate any constitutional prohibition.⁵⁰ A state

Wis. 121, 144 N. W. 290; Fire Department v. Helfenstein, 16 Wis. 136.

⁵⁰ See §§ 5752-5785, *supra*. See also Crane Co. v. Looney, 218 Fed. 260; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1; H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; Northern Pac. R. Co. v. Gifford, 25 Idaho 196, 136 Pac. 1131; Hirschfeld v. McCullagh, 64 Ore. 502, 130 Pac. 1131, *aff'g* judgment on rehearing 127 Pac. 541.

A statute requiring a foreign corporation to obtain a permit to do business in the state and pay a tax therefor based on the amount of its capital stock is invalid in respect to a foreign corporation carrying on both intrastate and interstate commerce in the state. Looney v. Crane Co., 245 U. S. 178, 62 L. Ed. 230, *aff'g* 218 Fed. 260.

For construction of various statutes requiring foreign corporations to pay a license tax or fee as a condition of the right to do business in the state, see the following cases:

United States. Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, construing Colo. Const. art. 15, § 10, 1 Mills' Ann. Stat. §§ 499, 500, Laws 1901, c. 52, § 10, and Session Laws 1902, p. 73, c. 3, § 64.

Indiana. State v. Mutual Life Ins. Co. of New York, 175 Ind. 59, 42 L. R. A. (N. S.) 256, 93 N. E. 213; Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514.

Kansas. Cudahy Packing Co. v. Denton, 79 Kan. 368, 99 Pac. 601, 97 Pac. 439.

Michigan. Warren-Scharf Asphalt Paving Co. v. Secretary of State, 115 Mich. 234, 73 N. W. 107.

Minnesota. State v. Schmahl, 133 Minn. 175, 157 N. W. 1082.

New York. People v. Sohmer, 206 N. Y. 634, 99 N. E. 1115; Huntington

v. Sheehan, 206 N. Y. 486, 100 N. E. 41; Portland Co. v. Hall & Grant Const. Co., 121 App. Div. 779, 106 N. Y. Supp. 649, rehearing granted 123 App. Div. 495, 108 N. Y. Supp. 821; People v. Miller, 105 App. Div. 326, 94 N. Y. Supp. 193; People v. Kelsey, 105 App. Div. 175, 93 N. Y. Supp. 369, *aff'd* 182 N. Y. 526, 74 N. E. 1123; People v. Kelsey, 105 App. Div. 132, 93 N. Y. Supp. 971, *aff'd* 185 N. Y. 546, 77 N. E. 1195; People v. Miller, 90 App. Div. 545, 85 N. Y. Supp. 849; Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836.

Oklahoma. For construction of Okla. Rev. Laws, §§ 1335, 3253, 7538-7549, in respect to fees and license taxes upon foreign corporations, see Maston v. Glen Lumber Co., 163 Pac. 128.

Oregon. Roane v. Union Pac. Life Ins. Co., 67 Ore. 264, 135 Pac. 892; Hirschfeld v. McCullagh, 64 Ore. 502, 130 Pac. 1131, *aff'g* judgment on rehearing 127 Pac. 541.

Virginia. Dalton Adding Mach. Co. v. Com., 118 Va. 563, 88 S. E. 167; American Surety Co. v. Com., 102 Va. 841, 47 S. E. 994.

Wisconsin. Smith v. State, 149 Wis. 63, 134 N. W. 1123.

For construction of statutes relative to payment of fees by foreign corporation on increase of capital stock, see:

Kansas. Cudahy Packing Co. v. Denton, 79 Kan. 368, 99 Pac. 601, 97 Pac. 439.

Michigan. Warren-Scharf Asphalt Paving Co. v. Secretary of State, 115 Mich. 234, 73 N. W. 107.

Minnesota. State v. Schmahl, 133 Minn. 175, 157 N. W. 1082.

New York. People v. Kelsey, 105 App. Div. 132, 93 N. Y. Supp. 971, *aff'd* 185 N. Y. 546, 77 N. E. 1195.

Pennsylvania. Com. v. American

has the power to require a foreign corporation to pay a license fee for the privilege of having an office in the state for the use of its officers, stockholders, agents or employees, when such corporation is not engaged in carrying on foreign or interstate commerce, or not employed by the federal government. The recognition of the existence of a foreign corporation, even to the limited extent of allowing it to have an office within its limits for such use is a matter dependent on the will of the state. It can make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation, if it

Steel Hoop Co., 226 Pa. 6, 74 Atl. 617.

In *People v. Sohmer*, 206-N. Y. 634, 99 N. E. 1115, aff'g 148 N. Y. App. Div. 514, 132 N. Y. Supp. 789, it was held that the license taxes imposed upon foreign corporations for the privilege of transacting business in the state should be based upon the par value of the capital stock of the corporation.

Under a Washington statute requiring a foreign corporation to pay a certain fee upon filing its articles of incorporation and forbidding the secretary of state to file such articles and the corporation from doing business in the state until such fee shall have been paid, and also requiring the payment of an annual license fee and affixing a penalty for its nonpayment at the time prescribed, it is held that it will be presumed in the absence of evidence to the contrary that the secretary of state performed his duty and did not file the articles of incorporation until the necessary fee was paid. It was also held that the payment of the annual license fee is a matter exclusively between the state and the corporation, and a failure to pay such fee does not in any manner affect the rights of the corporation as against third parties. *State v. Superior Court*, *Pierce County*, 42 Wash. 675, 85 Pac. 669.

The rule that in case of doubt as

to the validity of a tax the doubt should be resolved in favor of the citizen, has no application to the construction of a statute requiring the payment of a fee by a foreign corporation as a condition to its right to do business in the state. *American Can Co. v. Com.*, 104 Va. 683, 52 S. E. 393; *Standard Oil Co. v. Com.*, 104 Va. 683, 52 S. E. 390.

It is held that in the absence of constitutional inhibition the legislature may, in imposing a tax upon the gross receipts of a foreign corporation engaged in loaning money in the state, require that when the business is conducted by an agent, such agent shall make annually a sworn statement of the gross receipts derived from such business, and shall be personally responsible for the amount of the taxes levied upon such gross receipts. *State v. Sloss*, 83 Ala. 93, 3 So. 745.

Under a statute imposing an annual license tax upon "banks, banking associations, corporations or companies" engaging in the business of "lending money" or "dealing in exchange," such license tax cannot be imposed upon foreign express corporations because they transport money and issue negotiable money orders to persons delivering money to them. *State v. Pacific Exp. Co.*, 121 La. Ann. 651, 46 So. 682.

so desires. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state. Such a tax is not void as an attempt by the state to tax a franchise not granted to such state and property or business not within its jurisdiction, for no tax upon the franchise of the foreign corporation is levied, nor upon its business or property within the state, if the license tax is exacted only as a condition of its keeping an office within the state for no other purpose than that above mentioned. Such a requirement cannot be considered as a regulation of interstate commerce, nor does it come within the prohibition of that clause of the Constitution of the United States declaring that the "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," for corporations are not citizens within the meaning of that clause,⁵¹ nor the provision of the Fourteenth Amendment of the Constitution of the United States that "no state shall deny to any person within its jurisdiction the equal protection of the laws."⁵² After foreign corporations have

⁵¹ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342; *Ducat v. Chicago*, 10 Wall. (U. S.) 410, 19 L. Ed. 972; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357.

⁵² *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650. Mr. Justice Field, speaking for the Supreme Court of the United States, said in reference to this: "The inhibition of the amendment * * * was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall: 'The great object of a corporation is to bestow the

character and properties of individuality on a collective and changing body of men.' * * * The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation,

been admitted to do business in the state, their property will be dealt with in terms of equality with the property of the citizens, and it is subject to no further burden in the way of taxation than is imposed upon the resident, but for the privilege of doing business in the state they must submit to such conditions as the legislature sees fit to impose and a tax upon them for the privilege of doing business in the state, which is not in any sense a tax upon their property but is a privilege tax, is wholly unobjectionable.⁵³ Under a statute conferring upon a municipal corporation the power, within the jurisdiction of the municipality, to regulate agencies of all insurance companies, and to license, tax and regulate agents of all such companies doing business in the municipality, it was held that the municipal corporation had power to require foreign life and fire insurance companies to pay a license fee of a certain per cent of its receipts to the municipality.⁵⁴

Although a statute imposing a license fee upon foreign corporations seeking to do business in the state has been construed by the highest court of the state to have no application to corporations proposing to engage in interstate commerce, the secretary of state may demand the payment of the fee from a foreign corporation applying for a certificate of authority to do business in the state, and intending to engage only in private intrastate business.⁵⁵

lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may, therefore, require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment."

⁵³ *State v. Fleming*, 70 Neb. 523, 97 N. W. 1063. See also *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Scottish Union & National Ins. Co. of Edinburgh, Scotland, and London, England v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548, 80 N. W. 665.

⁵⁴ *Walker v. Springfield*, 94 Ill. 364.

For constitutionality of retaliatory legislation in respect to license fees, see *Home Ins. Co. v. Swigert*, 104 Ill. 653. See also § 5759, *supra*.

⁵⁵ *State v. Alderson*, 49 Mont. 29, 140 Pac. 82. See § 5989, *infra*.

Under a statute providing that every foreign corporation having its articles of incorporation on file in the office of the secretary of state "shall, on or before the first day of July of each and every year" pay to the secretary of state, for the use of the state, a certain annual license fee, it is held that the period for which the license is granted, begins on July first, and not on the date when the corporation was created or the beginning of the calendar year, and that the secretary of state will not be compelled by mandamus to issue to a foreign corporation a license for a calendar year.⁵⁶

§ 5901. Statutes requiring obtaining of permit or certificate. A state may require a foreign corporation to obtain a permit or certificate from a certain officer of the state before doing business in the state, and to comply with certain requirements or conditions before the issue of the permit, provided such corporation is not engaged in interstate commerce or is not in the employ of the federal government.⁵⁷ Thus under a statute providing that any foreign cor-

⁵⁶ *State v. Jenkins*, 22 Wash. 494, 61 Pac. 141.

⁵⁷ *United States. Looney v. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, aff'g 218 Fed. 260; *St. Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144.

California. Gutzell v. Pennie, 95 Cal. 598, 30 Pac. 836.

Indiana. Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236.

Iowa. State v. Omaha & C. B. Railway & Bridge Co., 91 Iowa 517, 60 N. W. 121.

Kansas. Wilson-Moline Buggy Co. v. Hawkins, 80 Kan. 117, 101 Pac. 1009.

Louisiana. See State v. Pacific Exp. Co., 121 La. 651, 46 So. 682.

Michigan. Moline Plow Co. v. Wilkinson, 105 Mich. 57, 62 N. W. 1119; *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474. See *Peninsular Power Co. v. Secretary of State*, 169 Mich. 595, 135 N. W. 656.

Missouri. Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720, 139 S. W. 525; *American Ins. Co. v. Smith*, 19 Mo. App. 627.

New York. Lewis Pub. Co. v. Lenz, 86 App. Div. 451, 83 N. Y. Supp. 841; *J. R. Alsing Co. v. New England Quartz & Spar Co.*, 66 App. Div. 473, 73 N. Y. Supp. 347, aff'd 174 N. Y. 536, 66 N. E. 1110; *Kinney v. Reid Ice Cream Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325; *American Cash Register Co. v. Griswold*, 68 Misc. 379, 125 N. Y. Supp. 4; *Singer Mfg. Co. v. Granite Spring Water Co.*, 66 Misc. 595, 123 N. Y. Supp. 1088; *People v. Seddon Underwriting Co.*, 27 N. Y. Cr. Rep. 146, 140 N. Y. Supp. 466.

Oregon. Johnson v. Seaborg, 69 Ore. 27, 137 Pac. 191; *Northwestern Elec. Co. v. Zimmerman*, 67 Ore. 150, Ann. Cas. 1915 C 927, 135 Pac. 330. See *National Mercantile Co. v. Watson*, 215 Fed. 929.

Pennsylvania. Com. v. Childs Dining Hall Co., 32 Pa. Super. Ct. 467.

Texas. English & Scottish-American Mortg. & Inv. Co. v. Hardy, 93 Tex. 289, 55 S. W. 169; *Russek v. Wind, Ems & Co.*, — Tex. Civ. App. —, 192 S. W. 584; *W. B. Clarkson & Co. v. Gans S. S. Line*, — Tex. Civ. App. —, 187 S. W. 1106; *Hughes v.*

poration desiring to do business in the state shall file with the secretary of state a duly certified copy of its articles of incorporation,

Four States Life Ins. Co., — Tex. Civ. App., 164 S. W. 898; A. Leschen & Sons Rope Co. v. Moser, — Tex. Civ. App., 159 S. W. 1018; New State Land Co. v. Wilson, — Tex. Civ. App., 150 S. W. 253; French, Finch & Co. v. Hicks (Tex. Civ. App.), 92 S. W. 1034; St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App.), 88 S. W. 512; Huffman v. Western Mortg. & Inv. Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

Vermont. International Text-Book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541.

West Virginia. Standard Home Co. v. Reed, 70 W. Va. 636, Ann. Cas. 1914 A 696, 74 S. E. 877; Virginia Acc. Ins. Co. v. Dawson, 53 W. Va. 619, 46 S. E. 51.

See §§ 5753, 5762-5784, *supra*.

A statute requiring every foreign corporation and every domestic corporation whose principal office and works are beyond the state, to appoint the state auditor its attorney in fact to accept service of process and notice in the state for such corporation and to pay him an annual fee for his services is not invalid as depriving such a domestic corporation of liberty of contract and property without due process of law, and denying it the equal protection of the laws, as the state has the clear right to regulate its own creations, and, a fortiori, foreign corporations permitted to do business within its borders, and such a statute puts all such domestic corporations, which elect to have their places of business and works outside of the state, and all foreign corporations coming into the state, on the same footing in respect to service of process, and the law operates on all of these alike. Such a classification is unreasonable and not open to constitutional objec-

tion. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 L. Ed. 144.

In order to do business in Illinois, it is not essential that a foreign corporation file for record in the recorder's office a certified copy of the certificate of the secretary of state that it has complied with the laws of the state. Central Inv. Co. v. Melick, 162 Ill. App. 474.

As to the manner in which the permit must, under the Pennsylvania statute, be exhibited for public inspection, see McManus Contracting Co. v. McFadden, 33 Pa. Super. Ct. 355.

A foreign corporation upon receiving from the secretary of state, pursuant to Gen. Corp. Law, § 15, a certificate that it has complied with all the requirements of law to authorize it to do business in New York, and that the business of the corporation to be carried on by the corporation in the state is such as may be lawfully carried on by a domestic corporation organized for such or similar business, becomes entitled to transact in the state business to the same extent as a domestic corporation incorporated for such or similar purposes might do. Burke v. Galveston, H. & H. R. Co., 173 N. Y. App. Div. 221, 159 N. Y. Supp. 379. See §§ 5707-5717, *supra*, for consideration of whether statute operates as a mere license to do business in the state or to domesticate a foreign corporation complying with its provisions.

A missionary society created under the laws of another state and not organized for pecuniary profit is not within the purview of the Illinois statute requiring foreign corporations to procure from the secretary of state a certificate authorizing it to do busi-

and thereupon the secretary of state shall issue to such corporation a permit to transact business in the state, and that no such corporation can maintain any suit in the courts of the state on any demand, whether arising out of contract or tort, unless at the time of such contract so made or tort committed the corporation has filed its articles of incorporation for the purpose of obtaining the permit, it was held that it was necessary for a foreign corporation, other than those engaged in interstate or foreign commerce or which are in the employ of the federal government, to have such permit to do business in the state, and that in an action brought by it, the petition must show that the statutory requisites to the right of the corporation to sue have been complied with.⁵⁸

Such statutes are construed to be not applicable to foreign corporations engaged in interstate or foreign commerce nor to corporations in the employ of the general government, for if applicable to them the statutes would be unconstitutional.⁵⁹ Nor do they apply to a suit in the courts of the state by a foreign corporation against a citizen of a foreign country on open account for goods shipped to him in such country from the foreign country by which the corporation was created.⁶⁰

A license or certificate issued by a public officer to a foreign corporation, in pursuance of such a statute, authorizing it to do business in the state, is at least *prima facie* evidence⁶¹ that the corpora-

nés in the state. *Eaton v. Woman's Home Missionary Soc. of M. E. Church*, 264 Ill. 88, 105 N. E. 746.

See § 5989, *infra*, for compelling issuance of license.

⁵⁸ *Huffman v. Western Mortg. & Inv. Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306. See *Looney v. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, *aff'g* 218 Fed. 260; *Reed v. Walker*, 2 Tex. Civ. App. 92, 21 S. W. 687; *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931.

⁵⁹ *Looney v. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, *aff'g* 213 Fed. 260; *Com. v. Texas & P. R. Co.*, 98 Pa. St. 90; *French, Finch & Co. v. Hicks* (Tex. Civ. App.), 92 S. W. 1034; *Huffman v. Western Mortg. & Inv. Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306;

Reed v. Walker, 2 Tex. Civ. App. 92, 21 S. W. 687; *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931.

See §§ 5753, 5762-5784, *supra*.

⁶⁰ *Russek v. Wind, Ems & Co.* (Tex. Civ. App.), 192 S. W. 584.

⁶¹ *Gutzeil v. Pennie*, 95 Cal. 589, 30 Pac. 836; *American Ins. Co. v. Smith*, 19 Mo. App. 627, 73 Mo. 368; *Washington National Building, Loan & Investment Ass'n v. Stanley*, 38 Ore. 319, 58 L. R. A. 816, 84 Am. St. Rep. 793, 63 Pac. 489.

See § 5997, *infra*.

It is sometimes provided by statute that a certificate or permit, or a certified copy thereof shall be sufficient evidence of the authority of the foreign corporation to do business in the

tion has complied with the law, unless the contrary appears on its face.⁶²

The license or permit given a foreign corporation to do business in the state may be revoked by the state, and the revocation is not the infliction of a penalty or the deprivation of a right.⁶³

§ 5902. Statutes requiring designation of agent for the service of process. Nearly all the statutes regulating the transaction of business in the state by foreign corporations require such corporations to file in some particular office in the state a written appointment of some person residing in the state upon whom service of process may be made. This provision is frequently a concomitant of other requirements, such as the filing of a copy of the charter or articles of incorporation, the designation of a principal place of business in the state, the making of a statement of the organization and financial condition of the corporation and other requirements which vary according to legislative judgment and discretion. Sometimes, however, the only requirement in such a statute is the appointment of such an agent, and in some instances the statutes merely require such appointment and are silent as to the effect of noncompliance by a foreign corporation in this respect, while in other instances a penalty is imposed, or contracts made during the period of noncompliance are declared void, or other consequences are provided for. The object of such legislation is to place under state supervision foreign corporations entering the state to engage in business and to protect the citizens of the state dealing with foreign corporations from imposition, and to secure convenient means of obtaining jurisdiction in the local courts, and not to prohibit foreign corporations from doing business with the citizens of the state, except upon compliance with terms of the statute.⁶⁴ Thus a statute requiring every foreign corporation before transacting any business in the state or acquiring property therein to appoint in writing a resident agent, authorized by it to accept service of process in any action against the corporation, and providing that in case of the failure of a foreign corporation to make such appointment, service might be made upon any officer or agent in the state, and if none should be

state. See *American Ins. Co. v. Smith*, 19 Mo. App. 627; *Northwestern Elec. Co. v. Zimmerman*, 67 Ore. 150, Ann. Cas. 1915 C 927, 135 Pac. 330.

⁶² *Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray (Mass.) 165.

⁶³ *State v. Standard Oil Co.*, 61 Neb.

28, 87 Am. St. Rep. 449, 84 N. W. 413. See §§ 5980-5989, 6005-6028, *infra*.

⁶⁴ *Tolerton & Stetson Co. v. Barek*, 84 Minn. 497, 88 N. W. 19. See also *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112.

found in the state upon any stockholder of the corporation, was held not to be intended by the legislature as a prohibition against the transaction of business within the state by foreign corporations except upon compliance with the terms thereof by the appointment of an agent resident within the state, upon whom service of summons or other process against the corporation might be made, but solely for the purpose of providing a method of obtaining jurisdiction of such corporations in the courts of the state by the service of summons or other process in actions or proceedings to which such corporation might be a party.⁶⁵

The propriety of such legislation has been pointed out by the Supreme Court of the United States, which said: "A vast amount of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises. It was well said * * * by Mr. Justice Swayne, in speaking for the court, in regard to service on an agent, that: 'When this suit was commenced, if the theory maintained by counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.' " ⁶⁶

⁶⁵ Tolerton & Stetson Co. v. Barek, 84 Minn. 497, 88 N. W. 19.

⁶⁶ Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569, quoting Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354.

A state in the exercise of its police power may require all corporations, domestic and foreign, establishing a place of business within the state, and carrying on business thereat to file a statement giving the name of an agent and location of his place of business where process can be had upon him for the corporation and such

a statute is not in violation of the commerce clause of the Constitution of the United States. Com. v. Parlin & Orendorff Co., 118 Ky. 168, 80 S. W. 791; Com. v. Read Phosphate Co., 113 Ky. 32, 67 S. W. 45; Knoxville Nursery Co. v. Com., 108 Ky. 6, 21 Ky. L. Rep. 1483, 55 S. W. 691; Com. v. Hogan, McMorro & Tieke, 25 Ky. L. Rep. 41, 74 S. W. 737. See Com. v. O'Bryan, Utley & Co., 153 Ky. 406, 155 S. W. 1126; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 40 L. R. A. (N. S.) 857, 143 S. W. 6; Com. v. Chattanooga Implement

In some states the statutes require that a foreign corporation before doing business in the state shall designate some state official upon whom service of process may be made in any action or proceeding to which the corporation is a party. Such statutes have been held to be constitutional.⁶⁷ So a statute requiring every foreign corporation doing business in the state to file a power of attorney appointing the state auditor its attorney in fact to accept service of process and notice in the state for it and by the same instrument to declare its consent that service of any process or notice in the state on such attorney shall be equivalent to, and shall be, due and legal service upon the corporation, is held not to deny it freedom of contract or freedom of choice of its agent or to deprive it of property without due process of law.⁶⁸

The legislature has power to change at any time the requirements in reference to the appointment of an agent upon whom process may be served in actions or proceedings to which the corporation is a party. Thus although the legislature of a state provided for service of process upon a particular person—the secretary of state—in behalf of a foreign corporation, and a foreign corporation had, pursuant to the provisions of the statute, duly appointed that officer its agent to receive process for it, it was held that the legislature had the right to subsequently provide by statute for service upon other agents, and if the corporation continued thereafter to do business in the state, it impliedly assented to the terms of the statute, at least to the extent of consenting to the service of process upon an agent

& Manufacturing Co., 126 Ky. 636, 31 Ky. L. Rep. 1019, 104 S. W. 389.

But a foreign corporation engaged in interstate commerce only is not required to comply with the laws of a state in regard to filing its articles of incorporation and designating an agent upon whom service of process may be made in order to transact interstate business. *Toledo Computing Scale Co. v. Young*, 16 Idaho 187, 101 Pac. 257.

See §§ 5762-5784, *supra*.

See §§ 5941-5979, *infra*, for the effect of noncompliance by foreign corporation with statutory requirements.

⁶⁷*Hill v. Empire State-Idaho Mining & Developing Co.*, 156 Fed. 797;

Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115; *Johnston v. Mutual Reserve Fund Life Ass'n*, 45 N. Y. Misc. 316, 90 N. Y. Supp. 539, *aff'd* 104 N. Y. App. Div. 544, 550, 629, 93 N. Y. Supp. 1048, 1052, 1062; *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 S. E. 955.

See § 5903, *infra*.

⁶⁸*State v. St. Mary's Franco-American Petroleum Co.*, 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38, 51 S. E. 865, *aff'd* 203 U. S. 183, 51 L. Ed. 144.

so far representative in character that the law would imply authority on his part to receive such service within the state.⁶⁹

Under a statute providing that before any foreign corporation shall begin to carry on any business in the state, it shall file in the office of the secretary of state a certificate designating an agent upon whom service of process may be made; it was held that where a foreign corporation had appointed an agent for such purpose, and afterwards filed a certificate appointing another person as the agent of such corporation, reciting that appointment was made under such statute, the authority of the first agent was impliedly revoked by the appointment of the second, and the filing of the certificate of such appointment in the office of the secretary of state, and that service upon the person first appointed as agent, made after the filing of the certificate appointing the second agent, was not sufficient to bind the corporation.⁷⁰

§ 5903. Statutes requiring consent to service of process upon state officials. Statutes providing that foreign corporations doing business in the state shall designate an agent upon whom process against the corporation may be served indicate the purpose of the state that foreign corporations engaged in business within its limits shall take controversies growing out of that business to its courts, and not compel a citizen having such controversy to seek the state in which the corporation has its home for the purpose of enforcing its claims. Many of the statutes simply provide that the foreign corporation shall name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process could be served. To remedy this defect some states have passed statutes providing that the corporation shall consent that service of process may be made upon a permanent official of the state, so that the death, removal or change of officer

⁶⁹ Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602; 43 L. Ed. 569.

⁷⁰ Mullins v. Central Coal & Coke Co., 73 Ark. 333, 84 S. W. 477. The court said: "While it is true that there is nothing in the law which prevents a foreign corporation from having in this state more than one agent upon whom summons may be served, we think the evidence does not show that this corporation had,

or intended to have, more than one agent for that purpose. On the contrary, it is shown that the authority of the first agent had been revoked, and the question is whether the appointment of the second agent, and the filing of the certificate of such appointment required by the statute, was sufficient notice of such revocation. As before stated, we are of the opinion that it was."

will not put the corporation beyond the reach of the process of the courts.⁷¹

71 United States. *Hunter v. Mutual Reserve Fund Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, rev'g 164 Ind. 321, 66 N. E. 703; *St. Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144, aff'g 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 51 S. E. 865; *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, aff'g 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145; *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687; *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386; *Southern R. Co. v. Simon*, 184 Fed. 959; *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367; *Vance v. Pullman Co.*, 160 Fed. 707; *Davis v. Kansas & T. Coal Co.*, 129 Fed. 149; *Sparks v. National Masonic Acc. Ass'n*, 73 Fed. 277; *Farmer v. National Life Ass'n*, 50 Fed. 829; *Knapp, Stout & Company v. National Mut. Fire Ins. Co.*, 30 Fed. 607; *Ehrman v. Teutonia Life Ins. Co.*, 1 McCrary 123, 1 Fed. 471.

Arkansas. *Vulcan v. Const. Co.*, 95 Ark. 588, 130 S. W. 583; *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148; *Union Guaranty & Trust Co. v. Craddock*, 59 Ark. 593, 28 S. W. 424.

California. *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 12 Cal. App. 445, 107 Pac. 633.

Indiana. *Modern Woodman of America v. Noyes*, 158 Ind. 503, 64 N. E. 21; *Rehm v. German Ins. & Sav. Inst.*, 125 Ind. 135, 25 N. E. 173; *Old Wayne Mut. Life Ass'n v. Flynn*, 31 Ind. App. 473, 68 N. E. 327.

Iowa. *Greaves v. Posner*, 111 Iowa

651, 82 N. W. 1022; *Sparks v. National Masonic Acc. Ass'n*, 100 Iowa 458, 69 N. W. 678.

Kansas. *Mutual Reserve Fund Life Ass'n v. Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387.

Kentucky. *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; *Aetna Ins. Co. v. Com.*, 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624; *American Fire Ins. Co. v. Bland*, 19 Ky. L. Rep. 287, 40 S. W. 670.

Louisiana. *The Fair v. American Union Fire Ins. Co.*, 135 La. 48, 64 So. 977.

Massachusetts. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855; *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206.

Minnesota. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404; *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

Nevada. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597; *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57.

New Jersey. *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 347, 60 Atl. 822.

New York. *Lafin v. Travelers' Ins. Co.*, 121 N. Y. 713, 24 N. E. 934; *South Pub. Co. v. Fire Ass'n*, 67 Hun 41, 21 N. Y. Supp. 675; *Johnston v. Mutual Reserve Co.*, 43 Misc. 251, 87 N. Y. Supp. 438, aff'd 45 Misc. 316, 90 N. Y. Supp. 539; *People v. Justices City Court*, 33 N. Y. St. Rep. 147, 11 N. Y. Supp. 773.

North Carolina. *Currie v. Goleconda Mining & Milling Co.*, 157 N. C. 209, 72 S. E. 980; *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E.

Such legislation has been frequently called in question, and as frequently decided to be a valid exercise of the power residing in the states to exclude foreign corporations altogether from their borders, or to admit them upon such terms and conditions as the states may deem proper for the protection of their own interests and those of their citizens.⁷²

Some of the statutes provide that the stipulations, agreeing that

667; *Mutual Reserve Fund Life Ass'n v. Scott*, 136 N. C. 157, 48 S. E. 581; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 S. E. 955.

Wisconsin. *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

See § 6033, *infra*.

Thus it was provided by statute in Kentucky: "Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors consenting that service of process upon any agent of such company in this state or upon the commissioner of insurance in this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office." *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 147.

Under a statute requiring a foreign insurance company before doing business in the state to appoint by a power of attorney the superintendent of the insurance department to be its agent for the service of process, it was held to be proper to follow the statute and appoint the superintendent of the insurance department as such, by his official name, and it was not necessary that the individual name of the superintendent should have been inserted in the power of attorney.

Laffin v. Travelers' Ins. Co., 121 N. Y. 713, 24 N. E. 934.

It was also held under such statute that the fact that the power of attorney appointed the superintendent of the insurance department or "his successor in office," was unobjectionable, as it was clearly an appointment of the present superintendent, and whoever might at any time be his successor, and it would be hypercritical to give the language any other meaning. *Laffin v. Travelers' Ins. Co.*, 121 N. Y. 713, 24 N. E. 934.

Under such a statute providing for the appointment of a state official, and requiring that a certificate of such appointment "duly certified and authenticated" shall be filed in a certain office, it was held that a formal power of attorney authorized by a formal resolution of the board of directors and purporting to be signed by the president and secretary of the corporation and its execution acknowledged by them before a notary public, whose certificate was attested by his seal, was sufficiently certified and authenticated to authorize its being filed, as the act did not require that it should be authenticated in any particular manner. *Laffin v. Travelers' Ins. Co.*, 121 N. Y. 713, 24 N. E. 934.

⁷² *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667, citing *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, and *Mutual Reserve F. L. Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987, and distinguishing *Pennoyer v. Neff*,

any legal process affecting the corporation, may be served on the state official or the agent specified by the corporation to receive service of process, cannot be revoked so long as any liability of the stipulating corporation to any resident of the state continues.⁷³ Under such a statute, a foreign corporation which has filed such stipulation, cannot, after ceasing to do business in the state, revoke the power of its agents, and render ineffective a service of process upon the state official in any action on an insurance policy issued while the corporation was doing business in the state.⁷⁴

By other statutes it is provided that no foreign insurance company shall be admitted and authorized to do business in the state until it shall by a duly executed instrument filed in his office constitute and appoint the insurance commissioner, or his successor in office, its true and lawful attorney upon whom all lawful processes in any action or legal proceeding against it may be served, and therein shall agree that any lawful process against it which may be served upon its said attorney shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in the state. Where such a statute obtains, the appointment which the foreign corporation is required to make and file with the state official before doing business in the state, authorizing the service of process in any action against it on such officer, is irrevocable for any cause as to all of its outstanding liabilities growing out of any business done in the state while the corporation was doing business therein.⁷⁵ Un-

95 U. S. 714, 24 L. Ed. 565, and *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338. See also *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, rev'g on another ground 164 Ind. 321, 73 N. E. 703; *Davis v. Kansas & T. Coal Co.*, 129 Fed. 149; *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822.

⁷³ *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, rev'g 164 Ind. 321, 73 N. E. 703; *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617; *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund*

Life Ass'n, 128 N. C. 5, 37 S. E. 955.

⁷⁴ *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 N. E. 955.

⁷⁵ *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115, distinguishing *Mutual Reserve Fund Life Ass'n v. Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387, and *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922; *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

In *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115, the court said: "It is the contention of the

der such statute it was held that notwithstanding the state official had revoked the license of a foreign insurance company, and that thereafter and before the commencement of the suit in question such company had executed and filed an instrument purporting to revoke such stipulation, it was irrevocable as to all of its outstanding liabilities growing out of any policies issued by it in the state while the stipula-

defendant that the sole consideration for the stipulation was the license to do business in this state, and that, when the latter was revoked for any cause, the stipulation was revocable, and, further, that the express provision of the statute to the effect that the stipulation shall continue irrevocable so long as any liability of the company remains outstanding in this state is not a bar to its right to revoke the stipulation or power, because it was not one coupled with an interest. The case of *Association v. Boyer* (Kan. Sup.), 61 Pac. 387, 50 L. R. A. 538, cited in support of this claim, is not in point, for the reason that the liability sought to be enforced in that case grew out of a policy made wholly in another state two years after its license had been revoked and it had ceased to do business in the state; or, in other words, the liability in that case was not, as in this, an outstanding liability of the company in the state at the time the power was revoked. The case of *Swann v. Association* (C. C.), 100 Fed. 922, also relied on by the defendant, is distinguishable from the one here under consideration. In that case the statute construed fixed no limit to the duration of the operation of the stipulation, and the court held that it was not perpetual, but 'coextensive, in its terms of existence, with the consideration, so to speak, upon which it was adopted, namely, the authority to it [the company] to transact business in the state.' But our statute fixes a limitation to the term of the power, which is 'irrevocable [only] so long

as any liability of the company remains outstanding in this state.' The only question, then, in this case is whether this provision of the statute is to be given any effect. The construction given to it and the stipulation by the defendant render both of no practical effect for the protection of resident policyholders, who accept their policies and part with their money while the stipulation is in force. Whether the stipulation is a power coupled with an interest within the technical meaning of that term it is unnecessary to inquire, for it is certainly an agreement relating to the remedy which policyholders might have for the enforcement of any liability of the company growing out of its policies issued while the stipulation is in force. The stipulation was not intended for the benefit of the insurance commissioner or of the state, but it was an agreement exacted by the state for the benefit of its citizens, as a condition precedent to the right of the company to do business in the state. It entered into and became a part of every policy which the company issued in the state while it was in force, and the insured acquired an interest therein to the same extent as if it were written into each policy, for the parties are deemed to have contracted with reference to the statute."

The designation of the state official is not revoked by the institution of insolvency proceedings against the corporation at its domicile. The *Fair v. American Union Fire Ins. Co.*, 135 La. 48, 64 So. 977.

tion in question, or any renewal thereof, continued in force.⁷⁶

Under a statute which merely provides that before authority shall be granted to a foreign insurance company to do business in the state, it must file with the commissioner of insurance a resolution of the board of directors consenting that service of process upon any agent of the company in the state or upon the commissioner of insurance of the state, in any action brought or pending in the state, shall be a valid service upon the company, such consent to service on the insurance commissioner is not limited to the time when the company is soliciting business in the state, but extends to service in any suit based upon an action brought on any policy issued while the insurance company was doing business in the state, even though the company had, prior to the institution of the suit, withdrawn from the state.⁷⁷

⁷⁶ *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

⁷⁷ *Home Ben. Soc. of New York v. Muehl*, 109 Ky. 479, 22 Ky. L. Rep. 1378, 59 S. W. 520.

In *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611, it was said: "There is no provision in the law limiting this consent to such time as the insurance company shall do business in this state. The object and purpose of the statute * * * was to provide a mode of service to citizens who should desire to sue upon contracts of the insurance company, rather than compel them to go to the state of the corporation for redress. If this consent is to be withdrawn as soon as the company withdraws, the provision, so far as the insurance commissioner is concerned, would be a useless provision. As long as the company is engaged in business here, service can be had on the agent; but when it ceases to do business, and has no agents, there is a necessity for some person upon whom process might be had. We conclude, therefore, when the reason of the statute is taken into consideration, that it is intended that

the consent to service on the insurance commissioner is not limited to the time when the company is soliciting business here, but extends to all business that it may do while here. As long as a policy issued is in force, or loss thereunder remains unsatisfied, this consent to service on the insurance commissioner is binding."

In *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987, in construing the same statute the rule announced by the Kentucky court was followed and it was held that service upon the insurance commissioner in such an action was binding upon the company, notwithstanding prior to the installation of the suit the insurance commissioner had revoked the authority of the company to do business in the state. The court said: "As an original question, and independently of any expression on the part of the [Kentucky] Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit to controversies growing out of that business to its courts, and

Other questions in connection with the effect of statutes requiring foreign corporations to file stipulations consenting to service of process upon state officials will be considered in that portion of this work treating on service of process upon foreign corporations.⁷⁸

§ 5904. Statutes requiring designation of agent for service of process and place of business. A state may require a foreign corporation other than a corporation not subject to exclusion or restriction by the state,⁷⁹ to maintain a known place of business within the state and an agent residing there, with authority to accept and receive service of process against the corporation, and to file a certificate in the office of the secretary of state, or some other office, designating such place of business and agent.⁸⁰ This is one of the most

not compel a citizen having such a controversy, to seek the state in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the state, so that the death, removal, or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It

is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the state had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens who had dealt with the association of the right to obtain relief in its courts." See also *Hunter v. Mutual Reserve Fund Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686.

⁷⁸ See §§ 6033, 6034, *infra*.

⁷⁹ See §§ 5738, 5753, 5762-5784, *supra*.

⁸⁰ *United States*. *Goodwin v. Colorado Mortg. & Inv. Co. of London*, 110 U. S. 1, 28 L. Ed. 47; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *French v. Lafayette Ins. Co.*, 5 McLean 461, Fed. Cas. No. 5,102, *aff'd* 18 How. 404, 15 L. Ed. 451; *Semple v. Bank of British Columbia*, 5 Sawy. 88, Fed. Cas. No. 12,659.

Alabama. *A. J. Cranor & Co. v. Miller*, 147 Ala. 268, 41 So. 678; *Hanchey v. Southern Home Building*

usual requirements in statutes regulating the doing of business in the state by foreign corporations and is generally a concomitant of the requirements that foreign corporations doing business in the state shall file in the office of a designated official of the state a copy of their respective charters or certificates of incorporation. Of all the statutory requirements in respect to foreign corporations doing business in the state it is probably the most important, as it enables foreign corporations to be subjected to the jurisdiction of the courts of the state and renders them liable to a personal judgment against

& Loan Ass'n, 140 Ala. 245, 37 So. 272; *Eslava v. New York Nat. Building & Loan Ass'n*, 121 Ala. 480, 25 So. 1013; *McLeod v. American Freehold Land Mortg. Co.*, 100 Ala. 496, 14 So. 409; *McCall v. American Freehold Land Mortg. Co.*, 99 Ala. 427, 12 So. 806; *Falls v. United States Savings, Loan & Building Co.*, 97 Ala. 417, 24 L. R. A. 174, 38 Am. St. Rep. 194, 13 So. 25; *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141; *New England Mortg. Security Co. v. Ingram*, 91 Ala. 337, 9 So. 140; *Craddock v. American Freehold Land Mortg. Co.*, 88 Ala. 281, 7 So. 196; *Dudley v. Collier*, 87 Ala. 431, 13 Am. St. Rep. 55, 6 So. 304; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; *Beard v. Union & A. Pub. Co.*, 71 Ala. 60; *American U. Tel. Co. v. Western U. Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90.

Arkansas. *State v. Hodges*, 114 Ark. 155, L. R. A. 1916 F 122, 169 S. W. 942; *Mullins v. Central Coal & Coke Co.*, 73 Ark. 333, 84 S. W. 477; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350.

Colorado. *Uteley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369; *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112.

Idaho. *Morris-Roberts Co. v. Mariner*, 24 Idaho 788, 135 Pac. 1166; *Kiesel v. Bybee*, 14 Idaho 670, 95 Pac.

20; *Smith v. Alberta & B. C. Exploration & Reclamation Co.*, 9 Idaho 399, 74 Pac. 1071.

Indiana. *Meixell v. American Motor Car Sales Co.*, 181 Ind. 153, Ann. Cas. 1916 D 375, 103 N. E. 1071; *Morrow v. United States Mortg. Co.*, 96 Ind. 21.

Iowa. *Green v. Equitable Mut. Life & Endowment Ass'n*, 105 Iowa 628, 75 N. W. 635; *Sparks v. National Masonic Acc. Ass'n*, 100 Iowa 458, 69 N. W. 678; *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653.

Kentucky. *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915 C 565, 161 S. W. 570; *Com. v. Read Phosphate Co.*, 113 Ky. 32, 23 Ky. L. Rep. 2284, 67 S. W. 45.

Massachusetts. *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81, 10 N. E. 729.

Ohio. *Eureka Ins. Co. v. Parks & Canfield*, 1 Cinc. Rep. 574, 13 Ohio Dec. 730.

Pennsylvania. *Dunbar Furnace Co. v. Pennsylvania R. Co.*, 237 Pa. 192, 85 Atl. 109; *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971; *Blakeslee Mfg. Co. v. Hilton Chemical Co.*, 5 Pa. Super. Ct. 184.

Tennessee. *Peters v. Neely*, 16 Lea 275.

See § 6031 et seq., *infra*, for service of process on other than designated agent.

them in such courts.⁸¹ In considering a constitutional provision that no foreign corporation shall do any business in the state without having at least one known place of business and an authorized agent or agents therein, the Supreme Court of Alabama said: "The real purpose of the constitutional requirement was to relieve persons who have dealings with foreign corporations of the burden of going out of the state to institute judicial proceedings for the redress of grievances suffered, or supposed to have been suffered, at the hands of such foreign corporations."⁸² A provision that every foreign corporation shall file in a designated public office of the state a statement showing a regular place of business in the state and the name of an agent to receive service of process against the corporation is a police regulation for the protection of the citizens of the state.⁸³

The requirement that a foreign corporation shall have a "known place of business" in the state does not mean that the place of business shall be known to all men. It is sufficient if the statement required to be filed designate the place of business and the name of the agent authorized to receive service of process binding upon the corporation and there is enough done to enable the public upon inquiry to ascertain the place of business and the name of the agent.⁸⁴ The designation of the particular office or other place of business if in a city or town, where the agent may be generally found in business hours, may be convenient for those desiring to find him but it is not necessary to come within the requirements of such a law.⁸⁵ But a designation of a certain city in the state as the place of business is sufficiently definite as to the place of business without naming a particular place in that city as the place of business.⁸⁶

The registered place of business need not be a place where the

⁸¹ *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Eureka Ins. Co. v. Parks & Canfield*, 1 Cine. Rep. (Ohio) 574; *Dunbar Furnace Co. v. Pennsylvania R. Co.*, 237 Pa. 192, 85 Atl. 106; *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 62 Atl. 971.

⁸² *New England Mortg. Security Co. v. Ingram*, 91 Ala. 337, 9 So. 140.

⁸³ *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915 C 565, 161 S. W. 570.

⁸⁴ *New England Mortg. Security*

Co. v. Ingram, 91 Ala. 337, 9 So. 140. See also *Eslava v. New York Nat. Building & Loan Ass'n*, 121 Ala. 480, 25 So. 1013; *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141.

⁸⁵ *McLeod v. American Freehold Land Mortg. Co.*, 100 Ala. 496, 14 So. 409.

⁸⁶ *Eslava v. New York National Building & Loan Ass'n*, 121 Ala. 480, 25 So. 1013; *McLeod v. American Freehold Land Mortg. Co.*, 100 Ala. 496, 14 So. 409.

business of the corporation is carried on, and the registered agent need not be one performing commercial duties for the corporation.⁸⁷

A certificate stating the location of the principal place of business and "that the general manager of said corporation, residing at said principal place of business, is the agent upon whom process may be served in all suits that may be commenced against said corporation," is not defective in that it did not designate the particular individual by name upon whom, as agent of the corporation, process might be served, but the requirement of the statute was sufficiently met by the designation of the "general manager" of the corporation, residing at its principal place of business in the state, as the agent to receive such process.⁸⁸

The fact that the statute requiring the appointment by a foreign corporation of an agent to receive service of process for the corporation, fixes no fee or compensation, does not prevent the parties from agreeing upon the payment of a certain compensation and upon the performance of other duties than that of receiving and forwarding copies of the served process.⁸⁹

⁸⁷ *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971.

Under Pennsylvania Const. art. xvi, § 5, providing that no foreign corporation shall do any business in the state, without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served, and the Act of April 22, 1874, Pa. Pub. Laws 1874, p. 108, it is held that the foreign corporation must register an agent for each office or place of business which it has established within the state. *Dunbar Furnace Co. v. Pennsylvania R. Co.*, 237 Pa. 192, 85 Atl. 109. It is held, however, that a foreign corporation has sufficiently complied with such constitutional and statutory provisions if it has registered its business office and agent thereat within the state and that it is not necessary for it to register in addition thereto a place of business in the state where it has stored ores to be smelted by a furnace company under a contract

made in another state. *Dunbar Furnace Co. v. Pennsylvania R. Co.*, 237 Pa. 192, 85 Atl. 109.

⁸⁸ *Goodwin v. Colorado Mortg. & Inv. Co. of London*, 110 U. S. 1, 28 L. Ed. 47. Mr. Justice Harlan said: "The object of the statute could be best subserved by a certificate of the character filed, for the obvious reason that the death or resignation of the incumbent would not long interfere with the bringing of suits against the corporation. Had there been, when the certificate was filed, no such officer of the corporation as a general manager, there would have been ground to contend that it had not performed the condition essential to its authority to do business in the state. But the answer makes no claim of that kind, but assumes that it was necessary to give the name of some individual upon whom process against the corporation might be served."

⁸⁹ *Leidigh & Havens Lumber Co. v. Clark*, 78 Ark. 539, 94 S. W. 686.

§ 5905. Whether agent required to be appointed must be commercial agent. Unless the statute providing for the designation of an agent upon whom process may be served so requires, it is not necessary that the person designated as such agent be a person performing any commercial duties for the corporation, nor is it necessary that the agent be one who is authorized to exercise some of the contractual powers which the corporation is empowered or permitted to exercise by its contracting instruments, but it is sufficient if his authority is limited merely to accepting and receiving service of process.⁹⁰

⁹⁰ *McCall v. American Freehold Land Mortg. Co.*, 99 Ala. 427, 12 So. 806; *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141; *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971.

The agent so appointed need not be authorized to do any act or to transact any business, to promote or carry on the business of the corporation, and yet may be an agent within the meaning of the law. *McCall v. American Freehold Land Mortg. Co.*, 99 Ala. 427, 12 So. 806; *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141.

Under the Pennsylvania statute it was held that where the registered agent was also the commercial agent, his resignation of his position and severance of his business relations with the corporation did not ipso facto annul his appointment as registered agent under the law, and he still continued to be such registered agent until the registration was canceled in such office where it was filed. *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971. In this case the court said: "Foreign corporations frequently appoint attorneys at law as their authorized registered agents and name their offices as places of business. In such cases it is not contemplated that the registered agent is the commercial business agent, or that his office is

the place to make contracts and display goods, but he is the agent with whom, and his office is the place where, the legal business, such as the service of process and other legal matter, may be made or transacted. This is the sense in which the word 'agent' and the phrase 'place of business' are used in the Constitution and the act of 1874. As applied to the present case, this means that the appointment of appellant as registered agent gave him a legal status as an authorized agent, disconnected with and independent of the performance of his commercial duties as the business agent of appellee. When, therefore, he resigned as commercial agent on September 1st, he did not by that act annul his appointment as registered agent. To sustain the contention of appellant in this respect, it would be necessary to hold that a foreign corporation must not only have a place of business and an authorized registered agent, but, to make the service of process legal and the business lawful, the registered agent must be physically present in the place of business when the process is served or the details of the business transacted. Such a construction of the act is not only unnecessary to effectuate its purpose, but would surround it with restrictions and limitations never intended. There must be at least one place of business and one registered agent in every case.

§ 5906. Statutes requiring deposit of securities. A state may require a foreign insurance company or other foreign corporation, provided it is not one of those which the state has no power to exclude from doing business in the state,⁹¹ to make a deposit or furnish other security for the protection of persons who may deal with it, and to whom it may become indebted.⁹² A statute providing that no foreign insurance company shall carry on business within the state without previously obtaining a license for that purpose, and that it shall not receive such license until it has deposited with the

There must also be as many registered agents as there are places of business, and each registered agent must have his headquarters at the designated place of business. When these conditions are complied with, the requirements of the act are met. After that the details of the commercial business and the service of legal process may be transacted or made, in the place of business, or outside of it, as in every other case of agency. At the time of the resignation of appellant as commercial agent of appellee the public record of his appointment as registered agent remained the same as before. He did not withdraw as registered agent, gave no notice of a change in his relation as such, and under these circumstances it cannot be doubted that, if legal process had been served on him after September 1st, it would have been good."

⁹¹ See §§ 5753, 5762-5784, *supra*.

⁹² **United States.** *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357. See *Kelsey v. Republic Savings & Loan Ass'n*, 110 Fed. 40; *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412; *Semple v. Bank of British Columbia*, 5 Sawy. 88, Fed. Cas. No. 12,659.

Arkansas. See *Federal Union Surety Co. v. Flemister*, 95 Ark. 389, 130 S. W. 574.

Georgia. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

Indiana. *Phenix Ins. Co. v. Burdett*,

112 Ind. 204, 13 N. E. 705.

New Hampshire. *Bank Com'rs v. Granite State Provident Ass'n*, 70 N. H. 557, 85 Am. St. Rep. 646, 49 Atl. 124.

New York. *People v. Granite State Provident Ass'n*, 161 N. Y. 492, 55 N. E. 1053, aff'g 41 App. Div. 257, 58 N. Y. Supp. 510.

North Dakota. *Clarke v. Olson*, 9 N. D. 364, 83 N. W. 519.

Ohio. *State v. Aetna Life Ins. Co.*, 69 Ohio St. 317, 69 N. E. 608; *State v. Tontine Ins. Co.*, 62 Ohio St. 428, 57 N. E. 60.

Pennsylvania. *List v. Com.*, 118 Pa. St. 322, 12 Atl. 277.

South Carolina. *Sandel v. Atlanta Life Ins. Co.*, 53 S. C. 241, 31 S. E. 230.

Texas. *Southwestern Surety Ins. Co. v. Anderson*, — Tex. Civ. App. —, 152 S. W. 816, 106 Tex. 46, 155 S. W. 1176; *Morrill v. Colonial Security Co. (Tex. Civ. App.)*, 102 S. W. 937.

Virginia. *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870; *Buck v. Guarantors' Liability Indemnity Co.*, 97 Va. 719, 34 S. E. 950.

Washington. *State v. Fishback*, 79 Wash. 290, 140 Pac. 387.

Wisconsin. *Lewis v. American Savings & Loan Ass'n*, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793.

See § 5830, *supra*.

treasurer of the state bonds of a specified character and to a specified amount, does not violate any of the provisions of the Federal Constitution.⁹³ Such a statute may further provide that the money or securities so deposited shall constitute a trust fund for the benefit of local creditors, and such a provision will not infringe upon the provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, since the corporation in making the deposit must be deemed to have assented that in case of insolvency the fund might be distributed according to the terms of the statute.⁹⁴

Where a deposit of the securities of a foreign corporation was made in order to enable it to do business in the state, and was within the power conferred upon the corporation, and not in violation of the trust reposed in the board of directors that the affairs of the corporation should be managed and its property applied for the purpose of carrying out the objects for which the corporation was created, it was held that the corporation, by its directors, having consented to and made the deposit, their action became binding alike on members and stockholders in other states, and they had thus waived all right to question the validity of the trust on which the securities were held.⁹⁵

⁹³ *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357. See § 5830, supra.

⁹⁴ *People v. Granite State Provident Ass'n*, 41 N. Y. App. Div. 257, 58 N. Y. Supp. 510, aff'd 161 N. Y. 492, 55 N. E. 1053.

⁹⁵ *Lewis v. American Savings & Loan Ass'n*, 98 Wis. 203, 39 L. R. A. 559, 73 N. W. 793. See § 5830, supra.

In *Morrill v. Colonial Security Co.* (Tex. Civ. App.), 102 S. W. 937, it was held that a deposit made by a foreign guaranty and surety company with the state treasurer under a statute making such a deposit a prerequisite to its right to do business in the state was a trust fund for the benefit of domestic creditors, and that an investor in the securities of the corporation subsequent to the time of the making of such deposit could not successfully say that the fund de-

posited occupied a different status from that agreed to by the parties who were then alone interested in the matter.

Where a building and loan association, desiring to do business in a foreign state as authorized by its charter, deposits, in compliance with the laws of such other state, a certain amount of securities with the treasurer of such state, to be held in trust for the benefit of the shareholders and creditors in such state, and is licensed to transact business in such state, and so transacts business for a number of years, such association cannot, upon subsequent insolvency, nor can a shareholder not a resident of such other state, plead that its act in making such deposit was ultra vires. *Clarke v. Olson*, 9 N. D. 364, 83 N. W. 519.

§ 5907. Statutes requiring books to be kept within the state.

Under the power which a state possesses to exclude foreign corporations or impose conditions upon their doing business within its limits, it is held that a state may require foreign corporations to keep certain books in the state for the inspection of stockholders and creditors.⁹⁶

⁹⁶ **Connecticut.** Pratt v. Meriden Cutlery Co., 35 Conn. 36.

Delaware. Richardson v. Swift, 7 Houst. 137, 30 Atl. 731.

New York. Wadsworth v. Equitable Trust Co., 153 App. Div. 737, 138 N. Y. Supp. 842; Hovey v. De Long Hook & Eye Co., 147 App. Div. 881, 133 N. Y. Supp. 25, aff'g 126 N. Y. Supp. 1; Hovey v. Proctor & Gamble Co., 139 App. Div. 521, 124 N. Y. Supp. 128; Hovey v. Eiswald, 139 App. Div. 433, 124 N. Y. Supp. 130; Hollaman v. El Arco Mines Co., 137 App. Div. 862, 122 N. Y. Supp. 852; Tyng v. Corporation Trust Co., 104 App. Div. 486, 93 N. Y. Supp. 928; Cox v. Island Min. Co., 65 App. Div. 508, 73 N. Y. Supp. 69, modified 175 N. Y. 328, 67 N. E. 586; In re Rappleye, 43 App. Div. 84, 59 N. Y. Supp. 338; People v. Lake Shore & M. S. Ry. Co., 11 Hun 1; Otto v. Franklin's Inc., 90 Misc. 311, 153 N. Y. Supp. 107; Alt-haus v. Guaranty Trust Co., 78 Misc. 181, 137 N. Y. Supp. 945; Pelletreau v. Greene Consol. Gold Min. Co., 49 Misc. 233, 97 N. Y. Supp. 391; Fay v. Coughlin-Sandford Switch Co., 47 Misc. 687, 94 N. Y. Supp. 628; People v. Montreal & B. Copper Co., 40 Misc. 282, 81 N. Y. Supp. 974; People v. Knickerbocker Trust Co., 38 Misc. 446, 77 N. Y. Supp. 1000; Recknagel v. Empire Self Lighting Oil Lamp Co., 24 Misc. 193, 52 N. Y. Supp. 635.

Ohio. State v. Farmer, 7 Ohio Cir. Ct. 429, 4 Ohio Cir. Dec. 664.

Wisconsin. See State v. Thompson's Malted Food Co., 160 Wis. 671, 152 N. W. 458.

As to the duties of a corporation with regard to keeping books, see §§ 2782-2805, *supra*.

As to the right of inspection of corporate books, see §§ 2809-2851, *supra*, and particularly as to statutes relative to foreign corporations, see §§ 2825, 2851, *supra*.

Such statutes are penal statutes and should be construed strictly. *Greene v. Shain*, 22 N. Y. Misc. 720, 49 N. Y. Supp. 1061.

A foreign corporation having an office in the state for the transaction of business therein may be required by mandamus to comply with the provisions of such statute. *People v. Montreal & B. Copper Co.*, 40 N. Y. Misc. 282, 81 N. Y. Supp. 974. See also § 2844 *et seq.*, *supra*. But such a statute has no application to a foreign corporation which is not doing business in the state. *People v. Mascot Copper Co.*, 202 Ill. App. 151, holding that a foreign mining company owning no property and transacting no business in the state but merely maintaining an office, leased in its treasurer's name, for convenience in conducting its internal affairs, was not subject to the requirement.

Under such a statute it is held that interest will not run on the penalties recovered (*Cox v. Island Min. Co.*, 65 N. Y. App. Div. 508, 73 N. Y. Supp. 69, modified on another point in 175 N. Y. 328, 67 N. E. 586), and that stockholders may make extracts from the stock book (*Fay v. Coughlin-Sandford Switch Co.*, 47 N. Y. Misc. 687, 94 N. Y. Supp. 628).

§ 5908. Statutes requiring proof of subscription or payment of capital stock. A state has the right to require that a foreign corporation, before doing business in the state, shall furnish proof of the subscription or payment of the whole or a certain percentage of its capital stock.⁹⁷

§ 5909. Statutes requiring statements of financial condition, and other matters. As will be seen elsewhere foreign corporations may be required by the laws of a state in which they seek to do business to make periodical reports concerning their financial condition.⁹⁸ A state may require a foreign corporation, whose right to do business within the state it has the power to regulate or restrict, to file a statement showing the amount of capital employed in its business, or other facts which the legislature may deem material.⁹⁹ The failure of a foreign corporation doing business in the state without complying with the requirements of a statute requiring foreign corporations desiring to do business in the state to file a certificate in the office of the secretary of state setting forth certain facts and making the officers, agents and stockholders of a non-complying corporation liable on all contracts of the corporation made within the state during the time that it is so in default, does not relieve it of its duty to file an annual report setting forth the financial condition of the corporation as required by another provision of the

⁹⁷ English & Scottish-American Mortg. & Inv. Co. v. Mardy, 93 Tex. 289, 55 S. W. 169. See also Fraser v. Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167.

As to the proof of subscription in the case of corporations generally, see § 692, supra; as to payment of subscriptions as affecting the right of such corporations to do business, see § 707, supra.

⁹⁸ See § 2860, supra. See also State v. Aetna Banking & Trust Co., 34 Mont. 379, 87 Pac. 268; Manhattan Trust Co. v. Davis, 23 Mont. 273, 58 Pac. 718; Bankers Life Ins. Co. v. Fleetwood, 76 Vt. 297, 57 Atl. 239.

⁹⁹ Colorado. Nolds v. Hendrie & Bolthoff Mfg. Co., 56 Colo. 322, 138 Pac. 22; Fraser & Chalmers v. Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167.

Indiana. United States Exp. Co. v. Lucas, 36 Ind. 361; Barney v. Daniels, 32 Ind. 19.

Kansas. Jordon v. Western U. Tel. Co., 69 Kan. 140, 76 Pac. 396, modified 70 Kan. 880, 85 Pac. 285; Swift & Co. v. Platte, 68 Kan. 1, 74 Pac. 635, 72 Pac. 271; Thomas v. Remington Paper Co., 67 Kan. 599, 73 Pac. 909; De Camp v. Warren Mortg. Co., 65 Kan. 860, 70 Pac. 581.

Massachusetts. Heard v. Pictorial Press, 182 Mass. 530, 65 N. E. 901; Washington County Mut. Ins. Co. v. Hastings, 2 Allen 398; Washington County Mut. Ins. Co. v. Dawes, 6 Gray 376.

Missouri. See Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720, 139 S. W. 525.

Montana. Manhattan Trust Co. v. Davis, 23 Mont. 273, 58 Pac. 718.

statute which makes its officers and directors liable for all its debts contracted by it during the year next preceding the time when such report should be filed and until it shall be filed, nor does it relieve such officers and directors from such liability.¹

§ 5910. Retaliatory constitutional or statutory provisions. In a number of states the legislatures have enacted statutes of a retaliatory nature for the purpose of putting foreign corporations under the same restrictions and burdens as are imposed by the statutes by which they were created upon corporations of the state enacting the statute.² In some states there are constitutional provisions to this

New Hampshire. *Pierce v. Yeaton*, 100 Atl. 604.

Ohio. *Bigalow Fruit Co. v. Armour Car Lines*, 74 Ohio St. 168, 78 N. E. 267.

As to reports required of corporations generally, see §§ 2852-2923, *supra*, and as to the applicability of these provisions to foreign corporations, see § 2860, *supra*.

See *Bigalow Fruit Co. v. Armour Car Lines*, 74 Ohio St. 168, 78 N. E. 267, for the application of Ohio Rev. St. 1906, §§ 148c, 148d to a foreign corporation, whose business was the furnishing of refrigerator cars and ice therefor for transportation purposes partly within the state and partly without and across the state.

New Hampshire Pub. St. c. 148, § 21, providing that foreign manufacturing corporations doing business in the state shall conform to the laws of the state as to returns and taxation, the same as domestic corporations, does not impose any liability upon officers or stockholders for failing to make such returns. *Pierce v. Yeaton*, — N. H. —, 100 Atl. 604.

¹*Nolds v. Hendrie & Bolthoff Mfg. Co.*, 56 Colo. 322, 138 Pac. 22. See also § 2861, *supra*.

The Illinois statute (J. & A. ¶ 2531) does not render void a contract of a foreign corporation which has failed to file the report, but simply provides

the penalty of exclusion from the state courts. The provision does not affect the right to resort to the federal courts. *Kawin & Co. v. American Colortype Co.*, 243 Fed. 317. See, generally, §§ 2891-2893, *supra*.

²**United States.** *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 30 L. Ed. 342; *First Nat. Bank of Butte v. Weidenbeck*, 97 Fed. 896.

California. *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076.

Georgia. *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

Illinois. *People v. Fidelity & Casualty Ins. Co. of New York*, 153 Ill. 25, 26 L. R. A. 295, 38 N. E. 752; *Germania Ins. Co. v. Swigert*, 128 Ill. 237, 4 L. R. A. 473, 21 N. E. 530; *Home Ins. Co. v. Swigert*, 104 Ill. 653.

Indiana. *Blackmer v. Royal Ins. Co.*, 115 Ind. 291, 17 N. E. 580; *State v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574.

Iowa. *State v. Fidelity & Casualty Ins. Co.*, 77 Iowa 648, 42 N. W. 509.

Kansas. *Phoenix Ins. Co. v. Welch*, 29 Kan. 672.

Maryland. *Talbott v. Fidelity & Casualty Co. of New York*, 74 Md. 536, 13 L. R. A. 584, 22 Atl. 395.

Minnesota. *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108.

Nebraska. *State v. Insurance Co. of North America*, 71 Neb. 120, 99

effect.³ As will be seen elsewhere; such a statute is not unconstitutional, either on the ground that it denies to persons within the jurisdiction of the state the equal protection of its laws; or because it violates the requirement of equality and uniformity in taxation, or, by the weight of authority, on the ground that it is, in effect, not itself the exercise of legislative power, but a delegation of the legislative power of the state to other states.⁴

It has been held that these statutes are penal in their character, and are, therefore, to be strictly construed.⁵ And in order that the

N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

New Hampshire. Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey. Texas Co. v. Dickinson, 79 N. J. L. 292, 75 Atl. 803; Wolf v. Lancaster, 70 N. J. L. 201, 56 Atl. 172.

New York. Griesa v. Massachusetts Ben. Ass'n, 133 N. Y. 619, 30 N. E. 1146, aff'g without opinion 60 Hun 581, 15 N. Y. Supp. 71; People v. Fire Association of Philadelphia, 92 N. Y. 311, 49 Am. Rep. 380.

Ohio. Wabash R. Co. v. Fox, 64 Ohio St. 133, 83 Am. St. Rep. 739, 59 N. E. 888; State v. Insurance Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658; State v. Western U. Mut. Life Ins. Co., 47 Ohio St. 167, 8 L. R. A. 129, 24 N. E. 392; State v. Reinmund, 45 Ohio St. 214, 13 N. E. 30.

Vermont. State v. Parker, 26 Vt. 357.

See § 5759, *supra*.

Under the New Jersey statute it has been held that a writ of mandamus will be issued requiring the secretary of state to issue a certificate authorizing a Texas corporation to do business in New Jersey, without the payment of such a license fee as the laws of the state of Texas exact from a New Jersey corporation for the privilege of doing business in Texas. Texas Co. v. Dickinson, 79 N. J. L. 292, 75 Atl. 803.

³ See Miles v. Woodward, 115 Cal. 308, 46 Pac. 1076; State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108.

⁴ See § 5759, *supra*.

⁵ State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 537, 31 N. E. 658. See also State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; Griesa v. Massachusetts Ben. Ass'n, 133 N. Y. 619, 30 N. E. 1146, aff'g without opinion 15 N. Y. Supp. 71.

In response to the contention that a statute of this character is reciprocal in character, and should, therefore, be liberally construed, the Supreme Court of Ohio said: "A little reflection will, we think, show that it is not of this nature, but, upon the other hand, retaliatory, and should, therefore, be strictly construed; or, in other words, not applied to a case that does not fairly fall within the letter. Reciprocity expresses the act of an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavours for disfavours. Accurately speaking, we reciprocate favors, and retaliate disfavours. This, then, is a retaliatory statute. It treats the companies of other states as Ohio companies are treated in them; but the moment it is made to appear that Ohio companies are not treated with the same favor in another state that companies of that state are treated with in Ohio, a case

statute may come into operation, it must clearly appear that the foreign law complained of will have the discriminating effect against which the statute is directed.⁶ In some of the states it has been held that the mere existence of a discriminatory law in another state is sufficient to put such a statute into operation.⁷ So the laws of the state may provide for a reciprocal tax upon foreign insurance corporations to become operative upon the enactment of legislation by other states imposing a tax upon insurance corporations organized under laws other than their own, and in such case the tax may become operative as against an insurance company of another state even though, as a matter of fact, no insurance company of the state is doing business in such other state.⁸ It has been held in Ohio, however, that since such a statute is retaliatory and penal in its character, and

is made for the application of its provisions, and retaliation follows as a result. It is true that the ultimate object of the statute is to secure reciprocity; but what we have to do with is not its ultimate, but its immediate, object, and that is to retaliate on the companies of a given state disfavor shown to Ohio companies in the same state." *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658.

⁶ *People v. Fidelity & Casualty Ins. Co.*, 153 Ill. 25, 26 L. R. A. 295, 38 N. E. 752; *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108; *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658.

⁷ *Germania Ins. Co. v. Swigert*, 128 Ill. 237, 4 L. R. A. 473, 21 N. E. 530; *State v. Fidelity & Casualty Co.*, 77 Iowa 648, 42 N. W. 509; *Talbott v. Fidelity & Casualty Co.*, 74 Md. 536, 13 L. R. A. 584, 22 Atl. 395.

Where a statute provided that "when by the laws of any other state any taxes, fines, penalties, licenses, fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed or would be im-

posed on insurance companies of this state doing, or that might seek to do, business in such other state, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business within this state, or upon their agents here," it was held that a foreign insurance company could not carry on more than one kind of insurance in the state when the state by which such corporation was created prohibited a foreign corporation from making in that state more than one kind of insurance, and that it was immaterial whether any domestic corporation had ever sought to do business in the state having such last-mentioned statute and been refused such permission. *State v. Fidelity & Casualty Co.*, 77 Iowa 648, 42 N. W. 509. See, however, *State v. Insurance Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658, distinguishing *State v. Fidelity & Casualty Co.*, 77 Iowa 648, 42 N. W. 509.

⁸ *State v. Insurance Company of North America*, 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

must be strictly construed, the mere fact that there is a discriminating statute in another state is not a sufficient ground for calling the enactment into operation, unless it is shown that there is a domestic corporation actually organized and liable to be affected by such discrimination. The court, in distinguishing the cases holding that the mere existence of a discriminatory statute in another state is sufficient to put such statute into operation, called attention to the fact that by the language of the statute involved in such cases, it was provided that it should be put in operation "when by the laws of any other state, any * * * prohibitions are imposed or would be imposed on insurance companies doing or that might seek to do business in such other state," while the Ohio statute contained no such provision, but merely provided that "when by the laws of any other state * * * any * * * prohibitions are imposed upon insurance companies of this state doing business in such state, * * * the same prohibitions, of whatever kind, shall be imposed upon all insurance companies doing business in this state."⁹

§ 5911. Statutes requiring foreign corporation not to become party to combination in restraint of trade. Sometimes it is required by a statute regulating the right of a foreign insurance company to transact business in the state that it shall file with a certain state official a contract or undertaking that it will not enter into any contract, agreement, arrangement or undertaking of any nature or kind whatever with any other corporation, or association, or person, the effect of which is to prevent open and free competition between it and others in the business transacted by it in the state. The validity of such a requirement has been upheld.¹⁰

§ 5912. Statutes imposing liability on agents of noncomplying corporation. A state may, in establishing conditions upon which foreign insurance companies will be permitted to do business in the state, provide that any insurance agent who directly or indirectly negotiates such insurance for a company not authorized to do business in the state shall be liable as co-insurer for all losses incurred by

⁹ State v. Insurance Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658, distinguishing Home Ins. Co. v. Swigert, 104 Ill. 653; State v. Fidelity & Casualty Co., 77 Iowa 648, 42 N. W. 509; Phoenix Ins. Co. v. Welch, 29 Kan. 672; Talbott v.

Fidelity & Casualty Co. of New York, 74 Md. 536, 13 L. R. A. 584, 22 Atl. 395, and State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108.
¹⁰ Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474. See also §§ 3388, 5783, supra.

any company under the terms of the policy so negotiated.¹¹ And, independently of statute, the rule that one assuming to act as agent for a legally incompetent principal renders himself personally liable to the person dealt with, unless the latter knew of the want of authority, has been applied to render liable as partners, directors and officers of a foreign corporation, not authorized to do business in the state, on contracts made by them in the corporate name.¹²

Where the legislature has prescribed certain conditions upon which foreign insurance companies may do business in the state and, for the purpose of making them more effective, has fixed penalties against any person undertaking to act as agent for an insurance company not authorized to do business in the state, it is held that any person undertaking to act as agent of a foreign insurance company not authorized to do business in the state is personally liable for any loss sustained on account of its insolvency or failure to fulfil its contracts

¹¹ **Alabama.** Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238, 14 So. 581.

Kentucky. Vertrees v. Head & Matthews, 138 Ky. 83, 127 S. W. 523.

Pennsylvania. McBride v. Rinard, 172 Pa. St. 542, 33 Atl. 750.

Texas. Price v. Garvin (Tex. Civ. App.), 69 S. W. 985.

Wisconsin. See Elwell v. Adder Mach. Co., 136 Wis. 82, 116 N. W. 882.

As to the liability of officers to creditors independently of statute and under statutes, see §§ 2569-2669, *supra*.

The purpose of such legislation is to protect the public from the evils incident to the writing of insurance throughout the state by so-called "wild-cat" companies, and the provision making the agent negotiating such unauthorized insurance liable upon the contract negotiated is intended to operate as a check against the increase of such business. Webster v. Ferguson, 94 Minn. 86, 102 N. W. 213.

Where a statute provides that any person who shall act as agent or solicitor of such company in the state without having first obtained a copy of the certificate authorizing the company to do business shall be guilty

of a misdemeanor, an agent of a foreign insurance company which was not authorized to do business in the state was not personally liable on a policy of insurance for misrepresenting to an applicant for insurance that the company was authorized to do business in the state. Jones v. Horn, 104 Mo. App. 705, 78 S. W. 638. See, however, McCutcheon v. Rivers, 68 Mo. 122; Landusky v. Beirne, 80 N. Y. App. Div. 272, 80 N. Y. Supp. 238, *aff'd* 178 N. Y. 551, 70 N. E. 1101.

In North Dakota, officers, agents and stockholders of foreign corporations doing business within the state without complying with the statutes thereof are made liable on all contracts of such corporation made within the state. Chesley v. Soo Lignite Co., 19 N. D. 18, 121 N. W. 73.

¹² Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650, *rev'g* 201 Ill. App. 445.

That officers are not liable for corporate debts by reason of failure of the corporation to comply with the statutory requirements or conditions precedent to the right to do business, in the absence of a statute imposing such liability, see § 2587, *supra*.

entered into with persons who did not know that the company was not authorized to do business in the state, and who believed that the person assuming to act for it was its duly authorized agent. As between the insured who in good faith accepts a policy believing it to be a solvent and responsible company and an agent who in violation of law induces him to take it, the agent should bear the loss.¹³ The liability of the agent in such case is based upon the theory that the corporation, if solvent and responsible, could have been compelled to pay the loss, and so, if for any reason the insured could not recover in an action against the corporation, neither can he recover in an action against the agent.¹⁴

Under a statute providing that any person who solicits insurance and procures the application therefor shall be held to be the agent of the party thereafter issuing the policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding, and that an insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him directly or indirectly for or in behalf of any company not authorized to do business in the state, it is held that an insurance agent, within the intent of the statute, is one who assumes to act for or on behalf of any company not authorized to do business in the state, and it is not essential that he be appointed as the representative of such company, or that he be the authorized agent of a duly licensed company.¹⁵ But under such a statute, a person assuming to act as such agent is not liable upon the contract in respect to which he assumed to act, by request, unless the insured was deceived by his conduct and led to believe that the companies involved in the transaction were duly authorized to do business in the state.¹⁶

¹³ *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523.

Generally an agent acting within the scope of his authority, and in the course of his employment, is not responsible for statements and representations which he makes. In making such statements and representations he acts for his principal, and the party who has been injured by them must look to the principal for indemnity or compensation. But if an agent knowingly makes false or fraudulent representations concerning any business matter intrusted to

him as agent or assumes in violation of a statute to act as agent, and the person with whom he is dealing is misled thereby to his prejudice, the agent will be personally liable. *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523, citing *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195.

¹⁴ *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523.

¹⁵ *Webster v. Ferguson*, 94 Minn. 86, 102 N. W. 213.

¹⁶ *Webster v. Ferguson*, 94 Minn. 86, 102 N. W. 213.

The legislature having no power to make officers, agents and employees, other than those within its jurisdiction, liable for claims against such noncomplying corporations, the reasonable construction of such a statute is that only such officers, agents and employees were intended to be embraced by the statute.¹⁷ A statute making officers, agents and stockholders of nonresident corporations doing business within the state without complying with the statutes thereof liable on any and all contracts of the corporation made within the state, renders such officers, agents and stockholders liable on the implied contracts or obligations of such corporations to return everything which was received by the corporation under an express contract with it by a party who has rescinded the express contract.¹⁸ Under a statute providing that the agent of any foreign insurance company which has not complied with the laws of the state, shall be personally liable on all contracts of insurance made by or through him, directly or indirectly for or on behalf of any such company, it is held that the contracts upon which an agent is made liable by such a statute are such contracts of insurance as are upon property in the state and no

¹⁷ *Richmond Standard Steel, Spike & Iron Co. v. Dininny*, 105 Va. 439, 53 S. E. 961.

The property owned in the state by a nonresident officer of a foreign corporation which has not complied with the laws of the state is not liable to attachment under such a statute. In so holding the Virginia court said in *Richmond Standard Steel, Spike & Iron Co. v. Dininny*, 105 Va. 439, 53 S. E. 961: "There are good reasons why the controlling officials of a foreign corporation, who cause their company to carry on business in this state in violation of her laws, should be made liable to her citizens for their claims against the company growing out of such business, if it could be done, although nonresidents of the state; but there is no reason for making, and it would be the grossest injustice to attempt to make, liable the subordinate officers and agents and employees of the company who did not reside in the state, and who were in no way responsible for

their company's acts in this state. If the defendant is personally liable for the plaintiff's claim and his property can be attached in this state and subjected to the satisfaction of the plaintiff's claim, any agent or employee of the company, no matter where he may reside, is also personally liable, and his property in the state may also be subjected for its payment, although he has never been in the state and did not even know that his company was doing business in it. While the language of the statute may be sufficiently comprehensive to embrace all officers, agents, and employees of such company, no matter where they reside, it is also, we think, under well-settled rules of interpretation, susceptible of the construction that it was only intended to include such officers, agents, and employees as are or have been in the state aiding in carrying on the prohibited business."

¹⁸ *Chesley v. Soo Lignite Coal Co.*, 19 N. D. 18, 121 N. W. 73.

others.¹⁹ Under a statute providing that the officers, agents and employees of any foreign corporation doing business in the state, without complying with certain conditions imposed upon them as prerequisite to their doing business in the state, shall be personally liable to any resident of the state having a claim against such company, it is held that the prohibition of the statute was against the doing of business in the state and not against the doing of business abroad which relates to property in the state, and that making a contract out of the state by which title to a tract of land in the state is acquired by a foreign corporation is not doing business in the state within the meaning of the statute, so as to render a director of the company personally liable for its debts.²⁰

A statute providing that if any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation or pretended corporation, without complying with the provisions of the statute, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation, or pretended corporation, has no application to the failure of a foreign corporation to take out a license to do business within the state.²¹

Some statutes provide that one acting as agent for a foreign corporation doing business in the state without complying with conditions precedent to its right to do business therein shall be guilty of crime punishable by fine or imprisonment, or both.²² Under a

¹⁹ *Rothschild v. Adler-Weinberger* S. S. Co., 130 Fed. 866, rev'g 123 Fed. 145.

²⁰ *Goldsberry v. Carter*, 100 Va. 438, 41 S. E. 858.

²¹ *Plew v. Board*, 197 Ill. App. 408, aff'd 274 Ill. 232, 113 N. E. 603.

As to the statutory liability of officers to creditors, see §§ 2591-2660, *supra*.

²² *United States*. *Hooper v. California*, 155 U. S. 647, 39 L. Ed. 297; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Pittsburgh Const. Co. v. West Side Belt R. Co.*, 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

Alabama. *Collier v. Davis*, 94 Ala.

456, 10 So. 86; *Elsberg v. State*, 52 Ala. 8.

Arkansas. *Woodson v. State*, 69 Ark. 521, 65 S. W. 465.

Illinois. *People v. People's Insurance Exchange*, 126 Ill. 466, 2 L. R. A. 340, 18 N. E. 774; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683.

Kentucky. *Sims v. Com.*, 114 Ky. 827, 71 S. W. 929; *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45; *Knoxville Nursery Co. v. Com.*, 108 Ky. 6, 21 Ky. L. Rep. 1483, 55 S. W. 691.

Missouri. *State v. New York Life Ins. Co.*, 81 Mo. 89; *State v. Beazley*, 60 Mo. 220; *State v. Stewart*, 47 Mo.

statute providing that an agent, who transacts business for a foreign corporation doing business in the state in violation of the statute, shall be liable to fine and imprisonment, it is held that such penalty is not in lieu of, but in addition to, his common-law liability to a person with whom he contracted on behalf of the foreign corporation.²³

In order to render the agent of a foreign corporation liable under a statute requiring foreign corporations before engaging in business in the state to have a known place of business therein and an agent thereat, and making it a penal offense for any agent of a foreign corporation, which has not complied with the statutory provision, to do any act of agency for the corporation, the act of agency must be done in the state, otherwise it does not fall within the statutory prohibition.²⁴

§ 5913. Statutes prohibiting or restricting maintenance of suits by foreign corporations. It has been seen heretofore that among the incidental or implied powers attributed to corporations is the power to sue.²⁵ And this right is implied to foreign as well as to domestic

382; *Jones v. Horn*, 104 Mo. App. 705, 78 S. W. 638; *State v. Charter Oak Life Ins. Co.*, 9 Mo. App. 364.

New Jersey. See *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33.

New York. *People v. Richardson*, 64 Misc. 684, 120 N. Y. Supp. 712.

Pennsylvania. *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552. See also *Pittsburgh Const. Co. v. West Side Belt R. Co.*, 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

As to the criminal liability of officers for acts done in their official capacity, see §§ 2724-2733, *supra*.

An indictment under the New York Penal Code for soliciting insurance for a foreign company without authority from the state should state the names of the persons from whom the insurance was solicited and who procured insurance in the company, or else should state that their names were unknown to the grand jury. *People v. Richardson*, 64 N. Y. Misc. 684, 120 N. Y. Supp. 712.

Where a state has the right to impose restrictions upon the right of foreign corporations to do business in the state and to forbid certain acts on their part, it can enforce such law by imposing a penalty upon the agents of foreign corporations who may commit the forbidden act. Consequently under a statute making it the duty of a corporation or person engaged in mining or selling coal by weight to weigh the same, and providing a punishment for failure to comply with provisions of the act on the part of persons, corporations and their agents and employees, it was held that the agent of a foreign corporation might be punished for a violation of the statute. *Woodson v. State*, 69 Ark. 521, 65 S. W. 465.

²³ *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552.

²⁴ *Collier v. Davis*, 94 Ala. 456, 10 So. 86.

²⁵ See § 2926 et seq., *supra*.

corporations.²⁶ To prevent a foreign corporation which has not complied with the conditions precedent to its right to do business in the state from defending an action brought against it in the courts of the state would be to deny it the equal protection of the law and to deprive it of its property without due process of law.²⁷ And a statute, providing that no foreign corporation shall sue or maintain any action at law or otherwise in any of the courts of the state unless it shall have appointed an agent upon whom process may be served in any action to which it may be a party and shall have filed a copy of its articles of incorporation in certain offices, is repugnant to the commerce clause of the Constitution of the United States, hence void, if it is applicable to transactions arising out of interstate commerce.²⁸

Statutes forbidding the right to maintain and institute actions, except as a means of enforcing compliance by foreign corporations with statutory conditions precedent to the right to do business in the state, are seldom found in any state; and when used for this purpose they do not withhold from a corporation which has failed to comply with such conditions the right to sue for the enforcement of contracts made before the act was passed, or contracts made between other parties and assigned to them, or contracts made by them without the state.²⁹ A state may, however, in a general way restrict the right of a foreign corporation to sue in its courts.³⁰ A statute which purports to curtail

²⁶ American De Forest Wireless Tel. Co. v. Superior Court City & County of San Francisco, 153 Cal. 533, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125, 96 Pac. 15; Empire Clothing Co. v. Roberts, Johnson & Rand Co., — Fla. —, 75 So. 634; Sterling Mfg. Co. v. National Surety Co., 94 N. Y. Misc. 604, 159 N. Y. Supp. 979.

See §§ 5990-6004, *infra*.

²⁷ American De Forest Wireless Tel. Co. v. Superior Court City & County of San Francisco, 153 Cal. 533, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125, 96 Pac. 15. See §§ 5755-5758, *supra*.

²⁸ Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. Ed. 193; Louisville Trust Co. v. Bayer Steam Soot Blower Co., 166 Ky. 744, 179 S. W. 1034, following Sioux Remedy Co. v. Cope, *supra*. See also International Text Book Co. v. Gillespie, 229 Mo. 397, 129

S. W. 922, following International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678, 18 Ann. Cas. 1103; British-American Portland Cement Co. v. Citizens' Gas Co., 255 Mo. 1, 164 S. W. 468.

See § 5992, *infra*.

"The expression found in some of our cases, to the effect that such corporations cannot sue in the courts of this state without qualifying under the Constitution and statutes, is too broad in its scope. Such a rule, if strictly enforced, would result in imposing unreasonable restraint on acts of interstate commerce. *Sioux Remedy Co. v. F. M. Cope*, 235 U. S. 197, 59 L. Ed. 193." Brown, J., in *Citizens' Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82.

²⁹ *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664.

³⁰ *Sioux Remedy Co. v. Cope*, 235

the privilege of foreign corporations to maintain or defend actions in the state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its objects and purposes.³¹ A statute requiring a foreign corporation desiring to transact business or solicit business in the state or to establish a general or special office in the state to file a copy of its charter with the secretary of state and procure from him a permit to do business in the state, and providing that no such corporation shall maintain any suit in the courts of the state unless at the time the cause of action arose, it had complied with the statutory requirements, does not forbid a foreign corporation from suing in the state courts merely because it is a foreign corporation, as the prohibition extends only to those foreign corporations desiring to transact or solicit business in the state or establish a general or special office in the state.³² It is held in Missouri that where a foreign corporation has a valid cause of action against a citizen of the state, it may sue such citizen thereon in the courts of the state, provided a citizen of the state might do the same, notwithstanding its failure to comply with a statute requiring foreign corporations to obtain a certificate to do business in the state and providing that no foreign corporation which shall fail to do so can maintain any action in any of the courts of the state.³³

If it does not appear that a foreign corporation plaintiff did business illegally in the state prior to its bringing suit, its doing business illegally after its institution of such suit does not constitute a defense.³⁴

§ 5914. Power of legislature to change statutes imposing conditions upon foreign corporations. Statutes imposing conditions precedent to the right of foreign corporations to do business in the state reflect and execute the general policy of the state upon matters of public interest, and each subsequent legislature has equal power

U. S. 197, 59 L. Ed. 193, rev'g 28 S. D. 397, 133 N. W. 683, and citing *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274, and *Anglo-American Provision Co. v. Davis Provision Co.* No. 1, 191 U. S. 373, 48 L. Ed. 225. See § 5992, *infra*.

³¹ *American De Forest Wireless Tel. Co. v. Superior Court City & County of San Francisco*, 153 Cal. 533, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep.

125, 96 Pac. 15; *Desserich v. Merle & Heaney Mfg. Co.*, 48 Colo. 370, 109 Pac. 949.

³² *Geiser Mfg. Co. v. Gray* (Tex. Civ. App.), 126 S. W. 610.

³³ *International Text Book Co. v. Gillespie*, 229 Mo. 397, 129 S. W. 922.

³⁴ *Delta Bag Co. v. Kearns*, 160 Ill. App. 93. See § 5748, *supra*, § 5995, *infra*.

to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting permission to a foreign corporation to do business in the state, making proper provision when necessary in regard to the rights of property of corporation already acquired, and protecting such rights from any illegal interference or injury.³⁵ Having the right to impose such terms as it may see fit upon a corporation, other than the excepted classes which a state has no power to exclude or restrict; as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the statute and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category of those upon which the legislature of a state may legislate from time to time as the public interests may seem to require. When the legislature of a state, therefore, permits a corporation to do business within its limits on appointing an agent therein upon whom process may be served, and when in pursuance of such provision a foreign corporation enters the state and appoints an agent for such purpose, no contract is thereby created which will prevent the state from afterwards passing another statute in regard to service of process and making such statute applicable to a corporation already doing business in the state. In other words, no contract was created by the fact that the corporation has availed itself of permission to do business within the state under the provisions of the statute with which it has complied.³⁶ Foreign corporations which, as a

35 United States. Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569; Standard Home Co. v. Davis, 217 Fed. 904; Manchester Fire Ins. Co. v. Herriott, 91 Fed. 711.

Illinois. See White Sew. Mach. Co. v. Harris, 252 Ill. 361, Ann. Cas. 1912 D 536, 96 N. E. 857.

Kansas. State v. Western U. Tel. Co., 75 Kan. 609, 90 Pac. 299; State v. American Book Co., 65 Kan. 847, 69 Pac. 563, appeal dismissed 193 U. S. 49, 48 L. Ed. 613.

Mississippi. Power v. Calvert

Mortg. Co., 112 Miss. 319, 73 So. 51.

Nebraska. State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

South Carolina. Sandel v. Atlanta Life Ins. Co., 53 S. C. 241, 31 S. E. 230.

Virginia. Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390.

See § 5752 et seq., supra.

36 Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569. Mr. Justice Peckham said: "As these statutes involve public interests, legislation regarding them are

matter of comity, have been permitted to enter, without restriction, a state, or a territory which afterwards became a state, have no vested right to remain there unlicensed, and must secure an express exemption or exemption by implication equally clear with express words, or they will be subject to all subsequent regulations which the state may see fit to adopt in the exercise of its police power.³⁷ As has been

necessarily public laws, and as stated in *Newton v. Commissioners*, 100 U. S. 548, at 559, 25 L. Ed. 710, at 711, 'Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power to repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.' The same principle is found in the following cases: *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Butchers' Union S. H. & L. S. H. Co. v. Crescent City L. S. H. & S. H. Co.*, 94 U. S. 645, 24 L. Ed. 302; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. Ed. 553." See also *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299, following and quoting with approval *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. Ed. 298; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116, 23 L. Ed. 825.

See § 5757, *supra*.

³⁷*State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299. Burch, J., said:

"The defense that the defendant came rightfully into the territory of Kansas and has been the beneficiary of certain complaisant acts of the state and territorial legislatures is clearly demurrable. None of these acts has either the form or the effect of a contract exempting the defendant from future legislation made necessary by the needs and changing conditions of the people of Kansas, and rights are not taken from the public or given to a corporation without the clearest disclosure of a positive intention to do so. The defendant came into the state as a foreign corporation, and has remained there as a foreign corporation. It came subject to the right to make all necessary modifications of the laws then in existence and subject to the adoption of future constitutional provisions and future general legislation. The fact that it entered without the payment of license fees gave it no vested right to remain unlicensed. Such a derogation from the power of the legislature must be found in express words somewhere in constitution or legislative act, or must follow by implication equally decisive with express words, or it cannot be suffered."

Mississippi Laws 1916, c. 92, providing that every foreign corporation doing business in the state shall file in the office of the secretary of state a copy of its charter, and pay certain fees, does not require a foreign corporation which has already filed its charter and secured a certificate of authority to do business in the state to refile its charter and pay such fees.

stated elsewhere,³⁸ a different rule obtains, however, where by virtue of its compliance with the laws of the state the foreign corporation has acquired a contract right to do business in the state for a certain period of time.³⁹

§ 5915. Effect of partial invalidity of statute regulating doing of business. Where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may be contained in the same section, and yet be distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance.⁴⁰ In other words, in such a case it is a well-settled principle of construction that where the void provisions are separable from those that are lawful, and those that remain are capable of being executed, the valid provisions will not be condemned because of the unconstitutionality of the other provisions not absolutely essential to the main purpose of the act.⁴¹

Conversely, while one portion of a statute may be unconstitutional and void, and another part good, this is the case only where the portions are clearly separable and susceptible of separate enforcement, but when it is apparent that the entire faulty enactment is designed to constitute a complete whole, and that one part would not have

Power v. Calvert Mortg. Co., 112 Miss. 319, 73 So. 51.

³⁸ See § 5757, *supra*.

³⁹ *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978. See also § 5757, *supra*.

⁴⁰ *Cooley Const. Lim.* (7th Ed.), p. 247, quoted with approval in *People v. Olson*, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23, and *State v. Stunt*, 52 Neb. 209, 71 N. W. 941.

"The rule of construction here announced so far as we have been able to ascertain, has been universally adopted by the courts both of this

country and Great Britain." *Wilkin, J.*, in *People v. Olson*, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23.

⁴¹ *People v. Olson*, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23. See also *State v. Dow*, 78 Conn. 53, 60 Atl. 1063; *State v. Patterson*, 50 Fla. 127, 7 Ann. Cas. 272, 39 So. 398; *Hanson v. Krehbiel*, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041; *White v. Gove*, 183 Mass. 333, 67 N. E. 359; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857; *State v. Scampini*, 77 Vt. 92, 59 Atl. 201.

been enacted except in connection with the other, if a part is found to be bad, the entire statute must fall.⁴²

The same rules obtain in reference to statutes imposing conditions precedent to the right of foreign corporations to do business in the state, where such statutes are partially invalid.⁴³ Thus where such

⁴² **United States.** *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, aff'g 99 Fed. 354.

Arizona. *Cronley v. Tucson*, 6 Ariz. 235, 56 Pac. 876.

Illinois. *People v. Olsen*, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23.

Kansas. *Hanson v. Krehbiel*, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041.

Nebraska. *Board of Education v. Moses*, 51 Neb. 288, 70 N. W. 946.

New Jersey. *Riccio v. Hoboken*, 69 N. J. L. 649, 63 L. R. A. 485, 55 Atl. 1108, rev'g 69 N. J. L. 104, 54 Atl. 801.

Tennessee. *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105.

Virginia. *Black v. Trower*, 79 Va. 123.

Wisconsin. *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400, 105 N. W. 1031, 1135.

Wyoming. *State v. Swan*, 7 Wyo. 166, 40 L. R. A. 195, 75 Am. St. Rep. 889, 51 Pac. 209.

"When a court finds that one part of a statute is in contravention of the fundamental law, the inquiry, so far as relates to the effect of this holding on the remainder, is whether the legislature would have passed such remaining and unobjectionable portion without the obnoxious feature. To give effect to any part of such act, the court must be convinced that the legislature intended that part to become the law uninfluenced by any consideration growing out of the provisions that were beyond the legislative power. It is not enough that

it cannot be said with positiveness that the joinder with the objectionable matter did contribute to the passage of the rest of the act; there must be an affirmative assurance that the desire to accomplish the unconstitutional purpose formed no part of the motive of the lawmakers in permitting the passage of that portion of the act which is free from objection." *Mason, J.*, in *Smith v. Haney*, 73 Kan. 506, 85 Pac. 550.

⁴³ **Diamond Glue Co. v. United States Glue Co.**, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838; *Robert Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 115 N. E. 711.

"If we should assume that the statute by entirely separable and distinct sections had provided for service of a summons both upon foreign corporations doing business within the state, and therefore constitutionally subject to such service, and upon corporations not doing business within the state and not constitutionally subject to service, there is no question that the statute might be upheld as to the one class, even though it fell as to the other." *Robert Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 115 N. E. 711. See, however, *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537, where there was involved a statute providing for service on foreign corporations, and it was held that the statute so clearly included foreign corporations without as well as within the constitutional jurisdiction of the state that it could not be upheld as to the latter if invalid as to the former; that both were "em-

a statute applied to partnerships as well as to corporations, it was held that, if the application of the provisions to corporations was several from, and independent of, its application to partnerships, it would be upheld so far as corporations were concerned, even though it was invalid in respect to its application to partnerships.⁴⁴

XIV. APPLICATION OF STATUTORY AND CONSTITUTIONAL RESTRICTIONS AND REGULATIONS

§ 5916. In general. As will be seen elsewhere,⁴⁵ the statutes regulating or restricting the rule of comity extended to foreign corporations generally prohibit foreign corporations from "doing business" in the state until they have first complied with certain conditions imposed by the statutes. The language of the statutes is, however, in this respect somewhat variant.⁴⁶ It is manifest that in order to invoke the application of such a statute against a foreign corporation, it is essential that the corporation in question come within the scope of the prohibition contained in the statute.⁴⁷

In construing and applying statutes prohibiting foreign corporations from "doing business" in a state without first complying with conditions imposed by the statutes, it is sometimes difficult to say whether a particular act or transaction constitutes the doing of business, within the meaning of the statute, and the decisions on the question are somewhat conflicting.⁴⁸ However, in many instances

bodied in a single general clause and included in a single declaration"; and that the constitutional and unconstitutional parts of the statute were not separable so that each might be read and stand by itself.

⁴⁴ *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838.

⁴⁵ See §§ 5894-5915, *supra*.

⁴⁶ See *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22. Consult the statutes of the respective states.

⁴⁷ *Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co.*, 178 Fed. 696; *Thomas v. Remington Paper Co.*, 67 Kan. 599, 73 Pac. 909; *Groneweg & Schmoentgen v. Estes*, 139 Mo. App. 36, 119 S. W. 513; *International Text-*

book Co. v. Connelly, 67 N. Y. Misc. 49, 124 N. Y. Supp. 603, aff'd 140 N. Y. App. Div. 939, 125 N. Y. Supp. 1125.

⁴⁸ *Alabama*. *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

Arkansas. *Simmons, Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775.

California. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411.

Illinois. *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480.

Kansas. *John Deere Plow Co. v. Wyland*, 69 Kan. 225, 2 Ann. Cas. 304, 76 Pac. 863.

New York. See *Hovey v. De Long*

they are probably reconcilable upon the ground that the language of the several statutes is variant, and therefore admit of different constructions. For example, in some states the prohibition is against "doing business," or, more strongly, "doing any business," while in others it is against "carrying on business," "establishing business," and the decisions may turn on this difference in verbiage.⁴⁹

From the cases, it will be seen that the phrase "doing business" is to be interpreted with regard to something more than the mere linguistic signification of the words used to the ordinary ear, and that it has acquired a narrower meaning in legal terminology.⁵⁰

For the most part, the cases merely hold that the expression "doing business" is not to be given such a strict and literal construction as to make it apply to any corporate dealing whatever, and they turn rather upon the character than upon the amount of business done. This is illustrated by the fact that the particular transactions under consideration are frequently described as "independent," "isolated," "occasional," "incidental," "accidental," "not of a character to indicate a purpose to engage in business in the state," as well as "single."⁵¹

While it has been held that the phrase "to transact business" as used in a statute providing that no foreign corporation shall be allowed "to transact business" within the state on more favorable conditions than are prescribed by law to similar domestic corporations, is equivalent to the words "to do business," found in the statutes prohibiting foreign corporations from doing business in the state until they have complied with certain conditions,⁵² in other decisions a

Hook & Eye Co., 211 N. Y. 420, 105 N. E. 667; Kline Bros. & Co. v. German Union Fire Ins. Co., 147 App. Div. 790, 132 N. Y. Supp. 181; Mahar v. Harrington Park Villa Sites, 146 App. Div. 756, 131 N. Y. Supp. 514, modifying 71 Misc. 430, 128 N. Y. Supp. 620, and rev'd 204 N. Y. 231, 38 L. R. A. (N. S.) 210, 97 N. E. 587.

North Dakota. State v. Robb-Lawrence Co., 15 N. D. 55, 106 N. W. 406.

Texas. Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22; York Mfg. Co. v. Colley (Tex. Civ. App.), 172 S. W. 206; Buhler v. E. T. Burrows Co. (Tex. Civ. App.), 171 S. W. 791.

⁴⁹S. R. Smythe Co. v. Ft. Worth Glass & Sand Co., 105 Tex. 8, 142 S. W. 1157; Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22; Buhler v. E. T. Burrows Co. (Tex. Civ. App.), 171 S. W. 791.

⁵⁰Caesar v. Capell, 83 Fed. 403. See also Hovey v. De Long Hook & Eye Co., 211 N. Y. 420, 105 N. E. 667.

⁵¹John Deere Plow Co. v. Wyland, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863.

⁵²General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411.

distinction has been stated to exist between the two.⁵³ The business activities of a foreign corporation in a state may be of such a nature as to render it amenable to service of process in an action brought against it in the state and yet not sufficient to render it necessary for it to comply with the requirements of a statute imposing conditions or restrictions upon the right of a foreign corporation to do business in the state.⁵⁴

§ 5917. Whether corporation "doing business," a question of fact. The question as to whether a foreign corporation is doing business in the state without complying with the requirements of a statute of the state prohibiting foreign corporations from doing business in the state until they have complied with certain statutory requirements, is a question of fact to be determined by the jury under the proper directions from the court, unless the facts bearing upon the question are undisputed, and the inference from them is so obvious as to leave no issue for submission to the jury.⁵⁵ The question is one

⁵³ In *S. R. Smythe Co. v. Ft. Worth Glass & Sand Co.*, 105 Tex. 8, 142 S. W. 1157, it is said that "there seems to be a distinction in those statutes which require the permit of foreign corporations to be secured where they desire 'to do business,' and where they desire 'to transact business' in the state. The two terms are not necessarily synonymous. To do business in this state imports a carrying on of business of the corporation for the purposes of its organization, while the transaction of business in this state rather imports the idea of isolated transactions in the line, of course, of the purposes of its creation. The Supreme Court of New York in the case of *People ex rel. Mills v. Montreal & B. Copper Co.*, 40 Misc. Rep. 282, 81 N. Y. Supp. 974, in deciding that case, on this subject, said: 'What is the meaning of "transaction of business"?' It is not necessarily synonymous with the term "doing business" as used elsewhere in this and similar acts. It does not necessarily mean that the main business of the corporation must be car-

ried on in this state, or something in the nature of that business, or that capital must be employed in this state.' " In making this distinction between "do" and "transact," it would seem that the Texas court ascribes to legislatures an unusual degree of meticulous precision in the use of terms.

⁵⁴ *International Text Book Co. v. Tone*, 220 N. Y. 313, 115 N. Y. 914, rev'g 162 N. Y. App. Div. 930, 147 N. Y. Supp. 1117; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, aff'g 174 App. Div. 866, 159 N. Y. Supp. 1145.

⁵⁵ *Audenried v. East Coast Milling Co.*, 124 Fed. 697; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239. See also *Elliott v. Parlin & Orendorff Co.*, 71 Kan. 665, 81 Pac. 500; *Vickers v. Buck Stove & Range Co.*, 70 Kan. 584, 79 Pac. 160; *J. B. Inderrieden Co. v. J. C. Johnson Co.*, 112 Minn. 469, 128 N. W. 570; *Liebig Mfg. Co. v. Hill*, 7 Pa. Super. Ct. 15.

In *Chicago, R. I. & P. Ry. Co. v. Neil P. Anderson Co.*, — Tex. Civ. App. —, 130 S. W. 182, it was said

not necessarily depending solely on single acts or on the effect of single acts, but on the effect of all the combined acts which the corporation performs in the state.⁵⁶ Whether a foreign corporation has bought materials and employed labor in the state in connection with its business done in the state are facts material to the determination of the issue as to whether its business is intrastate or interstate.⁵⁷ In determining whether a contract made by a foreign corporation involves a business to be carried on within the state, and is within the prohibition of the statute regulating the right of foreign corporations to do business therein, or whether it involves the business of interstate commerce, the contract much be construed as a whole.⁵⁸

§ 5918. Statutes generally applicable to foreign corporation transacting ordinary corporate business in state. In order that a foreign corporation may come within the purview of statutes imposing conditions upon foreign corporations doing business within the state it is generally held that such corporation must be transacting in the state some part of its ordinary corporate business.⁵⁹ In considering

that "what would constitute doing business in the state is a mixed question of law and fact."

See *Bellefield Co. v. Carleton Investing Co.*, 228 Fed. 621; *National Mercantile Co. v. Watson*, 215 Fed. 929.

⁵⁶ *Com. v. Wilkes-Barre & H. R. Co.*, 251 Pa. 6, 95 Atl. 915.

⁵⁷ *Frank Prox Co. v. Bryan*, 162 Ill. App. 381, citing *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239.

⁵⁸ *Haughton Elevator & Machine Co. v. Detroit Candy Co.*, 156 Mich. 25, 120 N. W. 18.

⁵⁹ *United States. Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Smithson v. Roneo*, 231 Fed. 349; *Natural Carbon Paint Co. v. Fred Bredel Co.*, 193 Fed. 897; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889; *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133; *Honeyman v. Colorado Fuel & Iron*

Co., 133 Fed. 96; *Sullivan v. Sheehan*, 89 Fed. 247; *Lamb v. Lamb*, 6 Biss. 420, Fed. Cas. No. 8,018.

Alabama. See *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388.

Arkansas. *Simmons, Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775.

California. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411.

Colorado. *Cockburn v. Kingsley*, 25 Colo. App. 89, 135 Pac. 1112.

Illinois. *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480; *Watson Fireproof Window Co. v. Rysdon*, 189 Ill. App. 134.

Kansas. *D. M. Osborne & Co. v. Schilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863.

what constitutes "doing business" in a state within the meaning of such a statute a distinction has been drawn between the purposes of a corporation and its powers.⁶⁰ In order that a foreign corporation may be said to be doing business in a state, there must be a doing or transacting of business for which the corporation was incorporated, and not merely what it might have authority to do.⁶¹ As was said by the Alabama court, "There must be a doing of some of the works,

Missouri. *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636.

Nebraska. *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529.

New York. *People v. Wells*, 183 N. Y. 264, 76 N. E. 24; *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L. R. A. 127, 75 N. E. 935; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, 29 N. E. 1002; *People v. Horn Silver Min. Co.*, 105 N. Y. 76, 11 N. E. 155; *Kline Bros. & Co. v. German Union Fire Ins. Co.*, 147 App. Div. 790, 132 N. Y. Supp. 181; *Mahar v. Harring Park Villa Sites*, 146 App. Div. 756, 131 N. Y. Supp. 514, modifying 71 Misc. 430, 128 N. Y. Supp. 620, rev'd 204 N. Y. 231, 38 L. R. A. (N. S.) 210, 97 N. E. 587; *Commercial Coal & Ice Co. v. Polhemus*, 128 App. Div. 247, 112 N. Y. Supp. 646; *Union Trust Co. of Rochester v. Sickels*, 125 App. Div. 105, 109 N. Y. Supp. 262; *People v. Raymond*, 117 App. Div. 62, 102 N. Y. Supp. 85; *Hovey v. De Long Hook & Eye Co.*, 126 N. Y. Supp. 1.

Oklahoma. *Fuller v. Allen*, 46 Okla. 417, 148 Pac. 1008.

Oregon. *Vermont Farm Mach. Co. v. Hall*, 80 Ore. 308, 156 Pac. 1073.

Pennsylvania. *Hall's Safe Co. v. Walenk*, 42 Pa. Super. Ct. 576.

Tennessee. *Interstate Amusement Co. v. Albert*, 128 Tenn. 417, 161 S. W. 488.

Utah. *George R. Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

Washington. See *M. E. Smith &*

Co. v. Dickinson, 81 Wash. 465, 142 Pac. 1133.

"The authorities agree that * * * 'doing any business' means business involving transactions concerning the actual purposes for which the corporation was organized, and does not include transactions between the incorporators and stockholders themselves involving transactions concerning promotion, transfers of stock and meetings of the board of directors for such purposes only." *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112.

Under a statute in Tennessee requiring foreign corporations before doing business in the state to file a copy of its charter in certain offices in the state, it was said that the dominant idea in the mind of the legislature was that foreign corporations should become domesticated in the state and become, *pro hac*, corporations of the state, suable in the courts of the state, responsible to the citizens of the state just as its domestic corporations were, and that it was that kind of "doing business" within the state which was contemplated by the statute. *Caesar v. Capell*, 83 Fed. 403.

⁶⁰ *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411; *Floyd v. Perrin*, 30 S. C. 1, 2 L. R. A. 242, 8 S. E. 14. See also *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480.

⁶¹ *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 So. 275; *International*

or an exercise of some of the functions, for which the corporation was created to bring the case within the clause.”⁶² Thus under a statute providing for conditions upon which foreign building and loan associations may transact business in the state, it was held that without complying with such conditions, a foreign building and loan association would have no right, by its officers or agents, to come into the state, and then solicit persons to become members of such association or solicit loans by such members, as such would have been transacting its ordinary business, but that such company would not be prohibited by any proper interpretation of such statute from investing in the bonds of the state, or of municipal or other corporations of the state,

Cotton Seed Oil Co. v. Wheelock, 124 Ala. 367, 27 So. 517; Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; Beard v. Union & American Pub. Co., 71 Ala. 60; Morgan v. White, 101 Ind. 413; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636.

The real test of whether a corporation is doing business in the state within the meaning of the Constitution is, is the corporation engaged in the transaction of the business, or any part thereof, which it was created and organized to transact? If it be, it “does business” within the meaning of the Constitution. If it be not, if the act it is doing or has done is not within its general powers and franchises—it is not the business to which the constitutional requirement is directed. Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

⁶² Beard v. Union & American Pub. Co., 71 Ala. 60, quoted in Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411; Smythe Co. v. Ft. Worth Glass & Sand Co., 105 Tex. 8, 142 S. W. 1157.

“While it has been held the mere fact that a foreign corporation owns the stock and bonds of domestic corporations does not in itself constitute

doing business in Pennsylvania (Commonwealth v. Standard Oil Company, 101 Pa. 119; People’s Building, Loan & Savings Association v. Berlin, 201 Pa. 1, 50 Atl. 308, 88 Am. St. Rep. 764; Commonwealth v. Curtis Publishing Company, 237 Pa. 333, 85 Atl. 360), the question whether or not the company is doing business within the state is one of fact not necessarily depending solely on single acts, or on the effect of single acts, but on the effect of all the combined acts which it may perform here. It does not appear the acts which were done in this state were a mere incident of defendant’s corporate existence, but were the performance of the function and business of the corporation itself. Taking the various acts which are admittedly done in this state, namely, the holding of directors’ meetings, the maintenance of a bank account, the purchase of the stock and bonds of the Pennsylvania corporations as one of the direct objects of its incorporation, the residence of the treasurer in Pennsylvania, and the performance of every act necessary to the actual business which the company is transacting, and they clearly constitute a doing business within this state.” *Mestrezat, J.*, in *Com. v. Wilkes-Barre & H. R. Co.*, 251 Pa. 6, 95 Atl. 915.

nor from enforcing such bonds.⁶³ Similarly it is held that a single sale of real estate by a foreign corporation organized for religious, missionary, educational and charitable purposes, and as incidental to such purposes granted a variety of powers, among which the power to take and hold for the objects of said corporation any real or personal property, and the power to sell and convey any estate which the interests of the corporation might require to be sold, did not constitute "doing business."⁶⁴ But a contract of a foreign corporation calls for a carrying on of its business in a state where it provides that it shall supervise the construction in such state of a factory for a domestic corporation engaged in the same business, shall have the management of the manufacturing therein and shall operate it for the domestic corporation, supplying the latter with a superintendent and supervising the factory, selling the entire output and guaranteeing payment on all sales, such contract extending over a term of years.⁶⁵ And where a foreign corporation ships its products to a place of business maintained by it in another state to be sold by its agent there, the taking of a bond insuring the agent's fidelity is so connected with the conduct of the corporate business as to constitute doing business in the state.⁶⁶

A contract entered into by a foreign corporation with the state or an agency of the state to enable the latter to perform a public duty imposed upon it has been held not to be doing business in the state. So under a statute authorizing the governor of the state to employ such competent accountants as he may deem necessary to cause a full investigation to be made of the various state departments, the governor may employ for that purpose a foreign corporation chartered

⁶³ Sullivan v. Sheehan, 89 Fed. 247.

⁶⁴ General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411, citing Clark & M., Priv. Corp. § 860. The court said: "All of these powers are to be exercised in subordination to the main purpose as at first declared. The purchase and sale of property by such a corporation is not one of the ends for which it was organized, but is merely a means to enable it to accomplish these ends. Property is to be acquired only for the objects of the corporation, and to be sold only when the interests of the corporation require such sale. The power to sell property by a corpora-

tion of this character is as purely incidental to the prosecution of its main purposes as are the other powers enumerated in the charter, as for example, the power to prosecute and defend suits at law. It is quite generally held that the mere prosecuting and defending of suits by a foreign corporation is not 'doing business,' within the meaning of statutes of the kind we have been discussing."

⁶⁵ Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 47 L. Ed. 328.

⁶⁶ M. A. Kelly Broom Co. v. Missouri Fidelity & Casualty Co., 195 Mo. App. 305, 191 S. W. 1128.

as a public accountant, and such corporation while engaged in making such examination on behalf of the state is not engaged in business in the state within the meaning and contemplation of a statute requiring a foreign corporation to obtain a permit to do business within the state.⁶⁷ This view was also taken concerning the contract of a foreign book company with a state text-book commission to supply books for use in the public schools.⁶⁸

§ 5919. Isolated or single transaction not doing business in a state.

In construing the effect of statutes prohibiting a foreign corporation from "doing business" or "doing any business" in the state until it has complied with specified requirements, there is some conflict, but the great weight of authority is to the effect that isolated transactions, especially commercial, do not constitute a "doing, transacting, or carrying on a business" within the meaning of such statutes, but that such statutes contemplate some continuance in business.⁶⁹ It has been said that "doing business" implies, in this connection, corporate

⁶⁷ *Haskins & Sells v. Kelly*, 74 Kan. 155, 93 Pac. 605.

⁶⁸ *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411. The court said: "The matter of procuring a corporation to supply needed books is purely a state affair. No private right attaches to it. Nor is the act one of ordinary trade or commerce, in which the state may divest itself of the attributes of sovereignty, and conduct itself as an individual may do. The most distinctively sovereign prerogatives of the legislature, under the Constitution, are enlisted and concerned. Unable to attend to certain details of the work proposed, a special agent was created, and clothed with such authority as seemed necessary to accomplish the legislative design. The text-book commission is a public agency created to aid in the assertion of a public right, and the execution of a public power in the interest of the public welfare."

⁶⁹ *United States v. Caldwell*, 187 U. S. 622, 47 L. Ed. 336; *Cooper Mfg. Co. v. Ferguson*,

113 U. S. 727, 28 L. Ed. 1137; *Beach v. Kerr Turbine Co.*, 243 Fed. 706; *Smith v. Roneo*, 231 Fed. 349; *Anderson v. Morris & E. R. Co.*, 216 Fed. 83; *Loomis v. People's Const. Co.*, 211 Fed. 453; *In re Tennessee River Coal Co.*, 206 Fed. 802; *Toledo Traction, Light and Power Co. v. Smith*, 205 Fed. 643; *Vulcan Steam Shovel Co. v. Flanders*, 205 Fed. 102; *National Carbon Paint Co. v. Fred Bredel Co.*, 193 Fed. 897; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889; *Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co.*, 178 Fed. 696; *Ladd Metals Co. v. American Min. Co.*, 152 Fed. 1008; *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 7 Ann. Cas. 219; *Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570; *aff'g* 5 Indian T. 636, 82 S. W. 937; *Audenried v. East Coast Milling Co.*, 124 Fed. 697; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.*, 118 Fed. 239; *Empire Milling & Mining Co. v. Tombstone Milling & Mining Co.*, 100 Fed.

continuity of conduct in that respect, such as might be evinced by

910; *Caesar v. Capell*, 83 Fed. 403; *Gilchrist v. Helena*, H. S. & S. R. Co., 47 Fed. 593.

Arizona. *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *Babbit v. Field*, 6 Ariz. 6, 52 Pac. 775.

Arkansas. *Simmons, Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775.

California. *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411; *Jameson v. Simmonds Law Co.*, 2 Cal. App. 582, 84 Pac. 289.

Colorado. *Roseberry v. Valley Building & Loan Ass'n*, 35 Colo. 132, 83 Pac. 637; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740; *Kindel v. Beck & Pauli Lithographing Co.*, 19 Colo. 310, 24 L. R. A. 311, 35 Pac. 538; *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 22 Pac. 325; *Cockburn v. Kingsley*, 25 Colo. App. 89, 135 Pac. 1112; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667.

Illinois. *Hunter W. Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521, aff'g 146 Ill. App. 257; *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480; *Watson Fireproof Window Co. v. Miller*, 194 Ill. App. 316; *Watson Fireproof Window Co. v. Rysdon*, 189 Ill. App. 134; *Journal Co. of Troy v. F. A. L. Motor Co.*, 181 Ill. App. 530.

Indian Territory. *Poole v. Peoria Cordage Co.*, 6 Indian T. 298, 97 S. W. 1015; *Ammons v. Brunswick-Balke-Collender Co.*, 5 Indian T. 636, 82 S. W. 937, aff'd 141 Fed. 570.

Indiana. *D. S. Morgan & Co. v. White*, 101 Ind. 413.

Iowa. *Ware Cattle Co. v. Anderson*, 107 Iowa 231, 77 N. W. 1026.

Kansas. *Sigel-Campion Live Stock*

Commission Co. v. Haston, 68 Kan. 749, 75 Pac. 1028.

Minnesota. *W. H. Lutes Co. v. Wysong*, 100 Minn. 112, 110 N. W. 367.

Missouri. *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496, 75 S. W. 633; *Mergenthaler Linotype Co. v. Hays*, 182 Mo. App. 113, 168 S. W. 239; *Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co.*, 60 Mo. App. 148.

Montana. *Dover Lumber Co. v. Whitecomb*, 54 Mont. 141, 168 Pac. 947.

New Jersey. *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724, dismissed 196 U. S. 458, 49 L. Ed. 551; *Delaware & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 45 L. R. A. 538, 43 Atl. 978; *Hildreth Granite Co. v. Freeholders of Hudson County*, 87 N. J. Eq. 588, 100 Atl. 158; *Henry v. Simanton*, 64 N. J. Eq. 572, 54 Atl. 153, rev'd on another ground in 67 N. J. Eq. 606, 61 Atl. 1065.

New Mexico. *Vermont Farm Mach. Co. v. Ash*, 170 Pac. 741; *Goode v. Colorado Inv. Loan Co.*, 16 N. M. 461, 117 Pac. 856.

New York. *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L. R. A. (N. S.) 127, 75 N. E. 935, aff'g 93 App. Div. 303, 87 N. Y. Supp. 869; *Cummer Lumber Co. v. Associated Manufacturers' Mut. Fire Ins. Co.*, 173 N. Y. 633, 66 N. E. 1106, aff'g 67 App. Div. 151, 73 N. Y. Supp. 668; *L. C. Page Co. v. Sherwood*, 65 Misc. 543, 120 N. Y. Supp. 837; *Novelty Tufting Mach. Co. v. Hutkoff*, 56 Misc. 522, 107 N. Y. Supp. 88; *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 41 Misc. 242, 84 N. Y. Supp. 38, aff'd 87 App. Div. 633, 84 N. Y. Supp. 1121; *National Knitting Co. v. Bronner*, 20 Misc. 125, 45 N. Y. Supp. 714;

the investment of capital in the state, with the maintenance of an

Interocean Forwarding Co., Inc. v. Charles B. McCormick & Co., 168 N. Y. Supp. 177, aff'd (App. Div.), 169 N. Y. Supp. 1098 (mem. dec.); People's Sav. Bank of Bay City Michigan v. Fulton Contracting Co., 119 N. Y. Supp. 622; Suydam v. Morris Canal & Banking Co., 5 Hill 491.

North Dakota. State v. Robb-Lawrence Co., 15 N. D. 55, 106 N. W. 406.

Oklahoma. Fuller v. Allen, 46 Okla. 417, 148 Pac. 1008.

Oregon. Weiser Land Co. v. Bohrer, 73 Ore. 202, 152 Pac. 869; Commercial Bank of Vancouver v. Sherman, 28 Ore. 573, 52 Am. St. Rep. 811, 43 Pac. 658.

Pennsylvania. Com. v. Wilkes-Barre & H. R. Co., 251 Pa. 6, 95 Atl. 915; Delaware River Quarry & Construction Co. v. Bethlehem & N. Passenger R. Co., 204 Pa. 22, 53 Atl. 533; Mearshon & Co. v. Pottsville Lumber Co., 187 Pa. St. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Kilgore v. Smith, 122 Pa. St. 48, 15 Atl. 698; Com. v. Standard Oil Co., 101 Pa. St. 119; Leasure v. Union Mut. Life-Ins. Co., 91 Pa. St. 491; Stoner v. Phillipi, 41 Pa. Super. Ct. 118; New Jersey Steel Tube Co. v. Riehl, 9 Pa. Super. Ct. 220; Blakeslee Mfg. Co. v. Hilton Chemical Co., 5 Pa. Super. Ct. 184.

Tennessee. Interstate Amusement Co. v. Albert, 128 Tenn. 417, 161 S. W. 488; Louisville Property Co. v. Nashville, 114 Tenn. 213, 84 S. W. 810; Davis & Rankin Bldg. & Mfg. Co. v. Caigle, 53 S. W. 240; Milan Milling & Manufacturing Co. v. Gorten, 93 Tenn. 590, 26 L. R. A. 135, 27 S. W. 971. See *In re Tennessee River Coal Co.*, 206 Fed. 802.

Texas. Dempster Mill Mfg. Co. v. Humphries, — Tex. Civ. App. —, 202 S. W. 981; Brown v. Guarantee Savings, Loan & Investment Co., 46 Tex. Civ. App. 295, 102 S. W. 138; Compare

Buhler v. E. T. Burrowes Co., — Tex. Civ. App. —, 171 S. W. 791.

Utah. A. Booth & Co. v. Weigand, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734.

Virginia. Goldsberry v. Carter, 100 Va. 438, 41 S. E. 858.

Washington. M. E. Smith & Co. v. Dickinson, 81 Wash. 465, 142 Pac. 1133; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

In Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137 (the leading case), where it was held that the making in the state of a single contract by which a foreign corporation agreed to build and deliver in its home state certain machinery, and the other party agreed to pay for it, did not constitute doing business in the former state within the meaning of a statute prohibiting foreign corporations from doing any business in the state before filing a certificate designating the principal place where the business of the corporation should be carried on and an authorized agent residing at such principal place of business upon whom process might be served, Justice Woods said: "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution required the foreign corporation to have one or more known places of business in the state before doing any business therein. This implies a purpose at least to do more than one act of business. For a foreign corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the state. To have known places

office for the transaction of business and those incidental circumstances

of business, it must be carrying on, or intending to carry on, business. The statute passed to carry the provision of the Constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place of business in the state where the business of the corporation is to be carried on. The meaning of the phrase 'to carry on' when applied to a business is well settled. In Worcester's dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's dictionary is: 'To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.' The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado. The obvious construction, therefore, of the Constitution and the statute is, that no foreign corporation shall begin any business in the state, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the state, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business or have a place of business in the state, would be unreasonable and incongruous." This case has been quoted with approval in *George R. Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630; *Goldsberry v. Carter*, 100

Va. 438, 41 S. E. 858. See also *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667, also construing same statute.

It has been said that the consensus is "that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state." *Doe v. Springfield Boiler & Manufacturing Co.*, 104 Fed. 684, quoted in *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

In considering a statute requiring a foreign corporation before it should "begin to carry on business" in the state to file a certificate in a certain office in the territory designating a resident agent upon whom service of summons or other process might be made, and stating the principal place of business of such corporation in the territory, and providing that if any foreign corporation shall fail to comply with the requirements of the statute, all its contracts with citizens and residents of the territory should be void as to the corporation and no United States court in the territory should enforce the same in favor of the corporation, *Adams, J.*, said: "We consequently have the question presented whether proof of one business transaction in the Indian Territory, with nothing more, without filing the certificate required by the act of Congress, is sufficient evidence of a purpose 'to carry on' a business, to subject plaintiff to the provisions of the act in question. An analysis of the act, in our opinion, discloses that

which attest the corporate intent to avail itself of the privilege to carry

Congress had in mind the conduct of some regular or systematic business. The requirement for filing a certificate is predicated upon the existence of a purpose to 'carry on business.' To 'carry on' means, according to lexicographers, to 'promote,' 'advance,' or 'help forward' (Webster). 'Business' means (1) 'That which busies' or 'that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time.' (2) 'Any particular occupation or employment engaged in for a livelihood or gain, as agriculture, trade, art, or a profession.' (3) 'Mercantile transactions or traffic in general' (Webster). All these definitions imply, if not express, the idea of some permanency or durability; something more than a single temporary or spasmodic undertaking. This thought, in our opinion, is involved in that portion of the act providing what the certificate shall contain. It says: 'Such certificate shall also state the principal place of business of such corporation in the Indian Territory.' This necessarily implies that the business of a foreign corporation before the filing of the required certificate becomes imperative, shall have become of such serious contemplation that it has some principal place in the Indian Territory where it is to be carried on. The foregoing considerations seem to strongly indicate that a single transaction like that disclosed in the agreed statement of facts was not intended by Congress to subject the actor to the confiscation denounced in section 5 of the act. In this view of the statute we are supported by abundant authority." *Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570, aff'g 5 Indian T. 636, 82 S. W. 937, and quoting with approval *Cooper*

Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137.

"Our statute restricts the disqualification to any foreign corporation which shall carry on any business, enterprise, or occupation in this state, involving the idea of continuation and repetition of the acts, and it is the act of such a corporation only that is within the purview of the law. There is a marked difference in doing an act of business and carrying on or pursuing a business, enterprise, or occupation in this state. The former is much more restricted than the latter, which indicates some permanency or durability, or something more than a single, temporary, or spasmodic undertaking. * * * One cannot fail to observe that the constitutional and statutory provisions of these states cited by appellant are more restrictive than the laws of Arizona now in question. Obviously the reasonable construction of the Arizona statute is not merely the beginning of any business, enterprise, or occupation which renders every act of the foreign corporation which has not complied with the law void, but it involves the idea of the pursuit of it, or carrying on the business, enterprise, or occupation by such a corporation in this state which makes the act of transacting business by such a corporation a violation of the law." *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

"The words 'doing business' as used in such statutes, refer to a general transaction of business, and not to an isolated transaction, or to single, or wholly collateral acts." *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693.

In *State v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406, the court said: "What is meant by 'doing business' or 'transacting business?' Re-

on a business.⁷⁰ On the other hand, the test has been said to be "not that it is a single transaction, but that it is done with the intent to engage in business."⁷¹

spondents contend that these terms must be taken literally and construed to conclude every act done by a corporation of a business nature. In that broad sense the making of a single contract, a single act of buying or selling, and even the prosecution or defense of an action would be a business transaction which could not be done in this state by a foreign corporation unless it had previously established a place of business here and complied with the statutory conditions. If that were the meaning of the language used in the statute and Constitution, it is apparent that in a large number of cases the enforcement of the law would interfere with interstate commerce. * * * The fact that foreign corporations proposing to do business here are required to establish a place of business within the state makes it clear that the term 'doing business' does not mean a single isolated transaction. It is not reasonable to suppose that the Constitution or the statute intended that a foreign corporation, without intending a continuance of its business in the state, could not collect a debt or make any contract or demand that its property rights should be respected unless it had previously acquired a situs or domicile within our borders. The object of laws of this character is to require foreign corporations which undertake to carry on their business generally in this state to establish a domicile or situs here so that they shall, like domestic corporations, be within reach of the process of our courts. The term 'transacting or doing business,' as used in laws of this character, implies continuity, and does not mean a single isolated transaction done within the

borders of the state without any purpose of engaging generally in the carrying on of its business here."

Where a foreign corporation leased a steam shovel to a resident of the state and upon the termination of the lease on account of the lessee's violation of the terms and provisions of the lease, sold the machine and installed it, it was held that as it did not appear that the corporation intended to carry on business in the state and the lease and sale of the machine constituted the only business which it had ever done in the state, it did not come within the purview of a statute regulating the doing of business in the state by foreign corporations. *Vulcan Steam Shovel Co. v. Flanders*, 205 Fed. 102.

⁷⁰*Simmons, Burks Clothing Co. v. Linton*, 90 Ark. 73, 117 S. W. 775; *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L. R. A. (N. S.) 127, 75 N. E. 935; *Badische Lederwerke v. Capitelli*, 92 N. Y. Misc. 260, 155 N. Y. Supp. 651. See also *Com. v. Wilkes-Barre & H. R. Co.*, 251 Pa. 6, 95 Atl. 915; *Delaware River Quarry & Construction Co. v. Bethlehem & N. Passenger Ry. Co.*, 204 Pa. 22, 53 Atl. 533; *Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct. 389.

In *Knapp v. Bullock Tractor Co.*, 242 Fed. 543, it was said that, upon reason and authority, "if the corporation is engaged in a more or less continuous effort, not merely casual, sporadic or isolated, to conduct and carry on within the state some part of the business in which it is usually and generally engaged, it may be said with due and becoming propriety to be 'doing business' within such state."

⁷¹*International Text-Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541.

In accordance with the majority rules, such constitutional and statutory restrictions upon the activities of foreign corporations have been held not to apply to the taking of a single mortgage to secure a past-due debt, with no intention apparently to transact other business of the kind in the state;⁷² nor to a contract by a foreign corporation with the owner of a building to furnish materials therefor, to be shipped into the state;⁷³ nor to a single sale of a cargo of coal in the state by an agent of a foreign corporation;⁷⁴ nor to the making of a single sale of coal to a resident of the state and the requirement of a guaranty of the payment for the same, the guaranty being made and delivered in the state.⁷⁵

"It is true that a single transaction does not necessarily constitute such a doing of business as is forbidden by the statute. * * * Whether or not it does fall within the statute depends upon whether it constitutes a part of a general attempt to transact business in violation of the statute. If it does, the first transaction is as illegal as the second, or third, or twentieth." *Mahar v. Harrington Park Villa Sites*, 146 N. Y. App. Div. 756, 131 N. Y. Supp. 514.

⁷² *Florsheim Bros. Dry-Goods Co. v. Lester*, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162, 29 S. W. 34, quoting with approval *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137.

⁷³ *New York Architectural Terra Cotta Co. v. Williams*, 102 N. Y. App. Div. 1, 92 N. Y. Supp. 808, aff'd 184 N. Y. 579, 77 N. E. 1192.

⁷⁴ *Penn. Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L. R. A. (N. S.) 127, 75 N. E. 935, aff'g 93 N. Y. App. Div. 303, 87 N. Y. Supp. 869.

⁷⁵ *Delaware & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 45 L. R. A. 281, 43 Atl. 978. The court, after reviewing the authorities, said: "On a consideration of the entire legislation on this subject, the construction of our statute seems to be clear. The statute requires the filing by the corporation of a copy of its charter, and

a statement of the amount of capital stock authorized and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state. The remarks of Mr. Justice Wood in *Manufacturing Co. v. Ferguson* [113 U. S. 727] apply directly to the language contained in this section. A statement of the amount of capital stock authorized and the amount actually issued would be an appropriate requirement if the corporation were to engage in business in this state, but inapt so far as relates to a single isolated transaction. 'The character of the business which it is to transact in this state' and the designation of its principal office in this state plainly imply the 'engaging in business' in the sense in which that term was defined in *Hoagland v. Segur* (38 N. J. L. 230, 237). The purpose of the certificate issued by the secretary of state is to authorize the corporation 'to transact business in this state,' and that officer is required to certify that the business is such as may be lawfully transacted by corporations of this state. These several provisions, as applied to a single isolated transaction like the one in question, would be inappropriate. A construction which would require the plaintiff, proposing to make this sale of coal and

It is held that a constitutional provision that no corporation shall do any business in the state without having one or more places of business, with an authorized agent, or agents, upon whom process may be served, is intended to prohibit corporations from transacting their ordinary corporate business within the state without first complying with its terms, and having one or more places of business, with an authorized agent upon whom process could be served in cases of litigation between them and citizens of the state, and to protect citizens of the state against fraud and imposition by insolvent and unreliable corporations, and place them in a position to be reached by legal process of the courts of the state, and was not designed or intended to prohibit the doing of a single act of business by such corporation, with no apparent intention to do any other act, or to engage in corporate business.⁷⁶ In like manner, under a statute providing that no action shall be maintained or recovery had in any of the courts of the state by any foreign corporation doing business in the state without first obtaining the certificate of the secretary of state that certain statements provided for in the statute have been properly filed, it is held in Kansas that isolated, independent transactions in that state incidentally necessary to the business of a foreign corporation conducted at its domicile, fully completed before the commencement of the action, will not prevent recovery in the courts of that state, where no repetition of such act is in contemplation, and the territory of the state is not being made the basis of operations for the

accept a guaranty of payment, first to file a statement of the amount of its capital stock authorized, the amount actually issued, and the character of the business which it was to transact in this state, and to establish a principal office in this state, would be unreasonable. The section of the act which imposes, under certain conditions, on foreign corporations 'doing business within this state' the same taxes, fines, penalties, license fees, etc., imposed on corporations of this state doing business in the other state, sheds a light on the meaning of the words 'doing business in this state' in the preceding section. It would scarcely be contended that the plaintiff, because of this single isolated transaction, would be liable

to taxes and license fees, etc., which by the laws of Pennsylvania are exacted from New Jersey corporations doing business in that state. The section which provides that such a corporation shall not maintain any action in this state upon a contract made by it in this state must receive the same construction. The words of the section are 'corporations so transacting business'; that is, corporations transacting business for which a certificate from the secretary of state is by the preceding section made necessary.'

⁷⁶ *George R. Barse Live Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630, quoting with approval *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137.

conduct of any part of the business of the corporation at the time the suit is begun.⁷⁷ And under a statute the purpose of which, as expressed in its title, was to "regulate the business of foreign corporations," and which provided that every foreign corporation before it shall be authorized or permitted to establish a business in the state, or to continue business therein, if already established, shall file a copy of its articles of incorporation in the office of the secretary of state and with the clerk of the county in which it has opened an office for the purpose of transacting business, and in addition shall within a prescribed time after it has opened an office, or commenced business, file a statement with such officers showing the proportional part of its capital stock which it has in use in the operation of its business, both in the state and in the county in which it does business, it is held that the use of the words, "to establish a business in this state or to continue business therein if already established," and the words "it has opened an office for the purpose of transacting business," and "after the establishment of such office," shows that the legislature had in mind a business that was "established" and "continuing" in the state, rather than mere single, isolated and transitory acts done in the state, either in connection with, or apart from, some business that had its domicile in another state.⁷⁸

§ 5920. Doctrine that a single transaction may constitute doing business. There are, however, some decisions which hold that a foreign corporation comes within the scope of a statute or a constitutional provision prohibiting foreign corporations from "doing business" or "doing any business" in the state until it has complied with certain conditions precedent, if it does a single act of its ordinary business within the state.⁷⁹ Thus under the Constitution of Alabama

⁷⁷ Sigel-Campion Live Stock Commission Co. v. Haston, 68 Kan. 749, 75 Pac. 1028, citing Thomas v. Remington Paper Co., 67 Kan. 599, 73 Pac. 909.

But it is held in that state that a single transaction by a foreign corporation may constitute a doing of business in that state within the meaning of such a statute, where such transaction is a part of the ordinary business of the corporation, and indicates a purpose to carry on a substantial part of its dealings in the state. John Deere Plow Co. v. Wyland, 69

Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863.

See also Buhler v. E. T. Burrowes Co. (Tex. Civ. App.), 171 S. W. 791.

⁷⁸ Simmons, Burks Clothing Co. v. Linton, 90 Ark. 73, 117 S. W. 775.

⁷⁹ George W. Muller Mfg. Co. v. First Nat. Bank of Dothan, 176 Ala. 229, 57 So. 762; Alabama Western R. Co. v. Talley-Bates Const. Co., 162 Ala. 396, 50 So. 341; State v. Bristol Sav. Bank, 108 Ala. 3, 54 Am. St. Rep. 141, 18 So. 533; Dundee Mortgage & Trust Inv. Co. v. Nixon, 95 Ala. 318, 10 So. 311; Nelms v. Edinburgh-American Land Mortg. Co., 92 Ala. 157, 9

which provides that "no foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents therein," and the statute passed in execution of such constitutional provision requiring foreign corporations doing any business in the state to have a known place of business in the state and to designate a local agent for the service of process, it is held that the making of a single contract or the doing of a single act of business in the exercise of a corporate function was prohibited by the Constitution and statute.⁸⁰ In accordance with the rule that

So. 141; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388; *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200; *Dudley v. Collier*, 87 Ala. 431, 13 Am. St. Rep. 55, 6 So. 304, distinguishing *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; see also *Chattanooga Nat. Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870.

The holding in *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408, which is sometimes cited as sustaining this rule cannot be considered as so doing, in view of the fact that the court held that the transaction involved, a stock subscription contract, came under the provision of the state statute rendering void and unenforceable by a non-complying foreign corporation "every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof," and that such result followed regardless of whether or not in making such contract the corporation was "doing business."

⁸⁰ *Chattanooga Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870, construing the Alabama constitutional and statutory provisions, and distinguishing *Bedford v. Eastern Building & Loan Ass'n of Syracuse*, 181 U. S. 227, 45 L. Ed. 834; *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am.

St. Rep. 141, 18 So. 533; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 So. 201.

It is held in Alabama that the loan of money in that state, and the taking there of notes and a mortgage to secure repayment—the mortgage being on land situated within the state—is the doing of business within the state within both the Constitution and the statute, even though it is but a single transaction. *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141, 18 So. 533; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 So. 201; *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200.

And the fact that the notes and mortgage are executed within the state, though they may be payable elsewhere, and the land embraced in the mortgage is situated in the state, are sufficient to show *prima facie* that the transaction involves the doing of business by the lender and mortgagee in the state. *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141, 18 So. 533; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 So. 201; *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200.

the exposition given by the highest tribunals of the state to its own constitution and statutes constitutes a part of the law as much as if embodied in it, and is as binding upon the courts of the United States as the text, and is conclusive in such courts, the federal courts follow the construction placed upon the Constitution and statutes of a state in respect to what constitutes the doing of business by a foreign corporation therein. The Supreme Court of the United States in considering the decisions of the Supreme Court of Alabama on this question said: "These cases constitute an interpretation of the constitutional and statutory provisions, and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the Constitution and statute, and that the contracts hence resulting are illegal and cannot be enforced in the courts."⁸¹ But even in the decisions which announce the doctrine that a foreign corporation may come within the purview of such a statute by the doing of a single act of business within the state, hold, it should be noted, that the single act which will bring the corporation within the purview of the statute must be an act of the ordinary business of the corporation. In the language of the Supreme Court of Alabama: "There must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created, to bring the case within that clause."⁸² Thus the statute has been held not to apply to the soliciting and receiving of subscriptions for a newspaper published in another state, by a corporation organized under the laws of that other state.⁸³ And where a foreign corporation which had operated a sawmill in the state and had constructed a railroad therein and a machine for loading lumber thereon, had suspended its operations, but had an agent in charge of such property, it was held that it was not doing business within the state, as the care and protection of unused property, or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed the exercise of corporate powers or franchises, nor the transaction of the business or any part thereof, for which the corporation was created and organized.⁸⁴

The Supreme Court of Kansas holds that although a corporation has

⁸¹ *Chattanooga Nat. Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870, aff'g 107 Fed. 777.

⁸² *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; *Beard v. Union & A. Pub. Co.*,

71 Ala. 60. See also § 5918, *supra*.

⁸³ *Beard v. Union & A. Pub. Co.*, 71 Ala. 60.

⁸⁴ *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

performed but a single transaction in the state, the corporation may, nevertheless, be deemed to be doing business therein where such transaction was part of its ordinary business and is indicative of its intent to carry on in future a substantial part of its business in such state. In the view of the court the circumstances surrounding a single transaction may be such as to indicate an intention to do business regularly in the state while the circumstances may show that a corporation has no such intent, although it has transacted several items of business therein.⁸⁵ In Nebraska also it is held that a single transaction by a foreign corporation may constitute a doing of business in that state within the meaning of the statutes of the state making certain require-

⁸⁵ John Deere Plow Co. v. Wyland, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863. The court said: "It is said * * * that: 'The doing of a single act of business in the domestic state by a foreign corporation does not constitute the doing or carrying on of business within the meaning of the statutory and constitutional provisions.' Many cases are cited in support of this proposition * * *. For the most part these authorities merely hold that the expression 'doing business' is not to be given such a strict and literal construction as to make it apply to any corporate dealing whatever. They turn rather upon the character than upon the business done. This is illustrated by the fact that the particular transactions under consideration are frequently described as 'independent,' 'isolated,' 'occasional,' 'incidental,' 'casual,' 'not of a character to indicate a purpose to engage in business within the state,' as well as 'single.' In the decision most frequently cited in this connection, Cooper Mfg. Co. v. Ferguson, 113 U. S. 277, 28 L. Ed. 1137, stress is laid upon the circumstance that there was no purpose to do any other business in the state. The controlling principle involved in these cases has already been applied by this court in Sigel-Campion Commission Co. v. Haston, 68 Kan. 749, 75

Pac. 1028. The scope of the rule invoked is stated, and the limitations to which it is subject are suggested, in the third paragraph of the syllabus in that case which reads: 'Isolated, independent transactions in this state incidentally necessary to the business of a foreign corporation conducted at its domicile, fully completed before action commenced, will not prevent recovery in the courts of this state by such corporation under section 1283, Gen. St. 1901, when no repetition of such acts is in contemplation, and the territory of the state is not being made the basis of operations for the conduct of any part of the corporation's business at the time the suit is begun.' Although the record in each case discloses but one transaction of the corporation, that transaction was not merely incidental or casual. It was a part of the very business to perform which the corporation existed. It did distinctly indicate a purpose on the part of the corporation to engage in business within the state, and to make Kansas part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the statute, while several acts of a different nature might not have had that effect."

ments of foreign corporations conditions precedent to their doing business in the state, where such transaction is a part of the ordinary business of such corporation and indicates a purpose to carry on a substantial part of its dealings in the state.⁸⁶

§ 5921. Interstate commerce business not within purview or restrictive statutes. While a state may impose conditions, not in conflict with the laws and Constitution of the United States, on the transaction of business in its territory by corporations chartered elsewhere, or exclude them altogether, or revoke permission or license already given to do business in such territory, as has been seen elsewhere, corporations engaged in interstate commerce do not come within such state authority and no restrictive conditions can be imposed upon them.⁸⁷ Therefore the doing of interstate commerce business is not "doing business" within the meaning of statutes imposing restrictions upon foreign corporations doing business in the state.⁸⁸

⁸⁶ *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529.

⁸⁷ See §§ 5762-5784, *supra*.

⁸⁸ *United States. Looney v. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, *aff'g* 218 Fed. 260; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137; *Star-Chronicle Pub. Co. v. United Press Ass'ns*, 204 Fed. 217; *In re Monongahela Distilling Co.*, 186 Fed. 220; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1; *Oakland Sugar Mills Co. v. Fred W. Wolf Co.*, 118 Fed. 239.

Idaho. Foore v. Simon Piano Co., 18 Idaho 167, 108 Pac. 1038.

Illinois. Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248, *aff'g* 149 Ill. App. 360; *West Coast Timber Co. v. Hughitt*, 185 Ill. App. 500; *Frank Prox Co. v. Bryan*, 185 Ill. App. 322; *American Art Works v. Chicago Picture Frame Works*, 184 Ill. App. 502, *aff'd* 264 Ill. 610, 106 N. E. 440; *Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145; *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557.

Kentucky. Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774, 195 S. W. 139.

Michigan. Coit & Co. v. Sutton, 102 Mich. 324, 25 L. R. A. 819, 60 N. W. 690.

Minnesota. American Bridge Co. v. Honstain, 113 Minn. 16, 128 N. W. 1014.

Missouri. Corn Products Mfg. Co. v. Western Candy & Bakers' Supply Co., 156 Mo. App. 110, 135 S. W. 985.

New York. Novelty Mfg. Co. v. Connell, 88 Hun 254, 34 N. Y. Supp. 717; *Badische Lederwerke v. Capitelli*, 92 Misc. 260, 155 N. Y. Supp. 651; *Murphy Varnish Co. v. Connell*, 10 Misc. 553, 32 N. Y. Supp. 492; *Osborne Co. v. Walters*, 155 N. Y. Supp. 434.

Ohio. Toledo Commercial Co. v. Glen Mfg. Co., 55 Ohio St. 217, 45 N. E. 197.

Oklahoma. Hollister v. National Cash Register Co., 154 Pac. 1157; *W. D. Wells Co. v. V. J. Howard & Co.*, 50 Okla. 766, 151 Pac. 616; *Fruit Dispatch Co. v. Wood*, 42 Okla. 79, 140 Pac. 1138.

Oregon. Vermont Farm Mach. Co. v. Hall, 80 Ore. 308, 156 Pac. 1073.

Thus a foreign corporation transacting in the state only business which constitutes interstate commerce need not comply with the provisions of a statute requiring foreign corporations doing business in the state to have a known place of business therein and an agent thereat upon whom service of process in actions against the corporation may be made.⁸⁹ In determining whether or not a statute prohibiting foreign corporations from doing business in the state was intended to apply to interstate commerce business, the court will adopt the rule that when two reasonable but inconsistent constructions are contended for, one of which would be repugnant to the constitution and the other would not, it is the duty of the court to adopt that interpretation of the statute which will harmonize with the constitution, and consequently will hold that the statute was not intended to apply to business constituting interstate commerce.⁹⁰

Pennsylvania. Philadelphia & G. S. S. Co. v. Pechin, 61 Pa. Super. Ct. 401; Putney Shoe Co. v. Edwards, 60 Pa. Super. Ct. 338; Blakeslee Mfg. Co. v. Hilton Chemical Co., 5 Pa. Super. Ct. 184.

Texas. Erwin v. E. I. Du Pont De Nemours Powder Co., — Tex. Civ. App. —, 156 S. W. 1097; Brown v. Guarantee Savings, Loan & Investment Co. (Tex. Civ. App.), 102 S. W. 138.

Washington. M. E. Smith & Co. v. Dickinson, 81 Wash. 465, 142 Pac. 1133.

See §§ 5762-5784, *supra*.

In Toledo Commercial Co. v. Glen Mfg. Co., 55 Ohio St. 217, 45 N. E. 197, it is said: "The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power. This rule does not deny the power of any state to impose conditions upon the right of foreign corporations to establish themselves within its boundaries for the performance, generally, of their business, involving the exercise of corporate franchises and powers, but does

hold that the selling through traveling agents and delivering of goods manufactured outside of the state, does not fall directly within the purview of their corporate powers. The pertinent provision of the Federal Constitution is that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states,' and that instrument gives to Congress power 'to regulate commerce * * * among the several states.' The distinction to be noted is that the sale and delivery of merchandise is a right possessed in common by all the citizens of the state. The exercise of the corporate franchise and powers is not. It is a special privilege conferred only on corporations. And the sale and delivery in one state, of goods manufactured in another state, by a citizen of that state, is interstate commerce."

⁸⁹ Blakeslee Mfg. Co. v. Hilton Chemical Co., 5 Pa. Super. Ct. 184.

See §§ 5762-5784, *supra*.

⁹⁰ Havens & Geddes Co. v. Diamond, 93 Ill. App. 557. See also Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1; Oakland Sugar Mill Co. v. Fred W. Wolf, 118 Fed. 239; Coit &

§ 5922. Sales of goods through traveling salesmen or agents. A foreign corporation will not be deemed to be doing business within a state within the meaning of statutes imposing restrictions upon the doing of business in the state by foreign corporations merely because it solicits orders for such goods by means of traveling salesmen or other agents, the orders being transmitted to the corporation in the state of its domicile and the goods shipped from there into the state where the orders were solicited.⁹¹ Where a foreign corporation

Co. v. Sutton, 102 Mich. 324, 25 L. R. A. 319, 60 N. W. 690.

See § 5764, *supra*.

"We think all courts agree that these statutes must receive such construction and enforcement as will not interfere with interstate commerce, and almost all agree that the sale and delivery of goods or manufactured commodities, not properly subject to police surveillance, by a citizen or corporation of one state to a citizen or corporation of another state is interstate commerce." Willis, J., in *Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145. See also *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139.

⁹¹ **United States.** *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336; *Brennan v. Titusville*, 153 U. S. 289, 38 L. Ed. 719; *Stoutenburgh v. Henrick*, 129 U. S. 141, 32 L. Ed. 637; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137; *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288; *Boardman v. McClure*, 123 Fed. 614; *Aultman, Miller & Co. v. Holder*, 68 Fed. 467, *aff'd* *Holder v. Aultman, Miller & Co.*, 169 U. S. 81; 42 L. Ed. 669; *Davis v. Rankin Mfg. Co. v. Dix*, 64 Fed. 406.

See *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, *aff'g* 147 Ky. 655, 145 S. W. 393; *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.*, 174 Fed. 131.

Alabama. *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145, 9 So. 136.

Idaho. *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 58.

Illinois. *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248, *aff'g* 149 Ill. App. 360; *Anderson Computing Scale Co. v. Hattenbach*, 199 Ill. App. 467; *Hagan Paper Co. v. East St. Louis Pub. Co.*, 190 Ill. App. 581; *West Coast Timber Co. v. Hughitt*, 185 Ill. App. 500; *Frank Prox Co. v. Bryan*, 185 Ill. App. 322; *American Art Works v. Chicago Picture Frame Works*, 184 Ill. App. 502, *aff'd* 264 Ill. 610, 106 N. E. 440; *Ajax-Grieb Rubber Co. v. Gray*, 179 Ill. App. 377; *Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145; *American Sales Book Co. v. Wemple*, 168 Ill. App. 639; *A. H. Woods Production Co. v. Chicago, C. & L. R. Co.*, 147 Ill. App. 568; *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557; *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683.

Indian Territory. *Bruner v. Kansas Moline Plow Co.*, 7 Indian T. 506, 104 S. W. 816.

Indiana. *Mutual Mfg. Co. v. Alsbaugh*, 174 Ind. 381, 91 N. E. 504, *rehearing denied* 92 N. E. 113.

Kentucky. *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139.

Michigan. *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 114 Mich. 64; 72 N. W. 117; *Moline Plow Co. v. Wil-*

manufactures goods in a foreign state, and sends drummers into another state who solicit and take orders in the state and send them to

kinson, 105 Mich. 57, 62 N. W. 1119; Coit & Co. v. Sutton, 102 Mich. 324, 25 L. R. A. 819, 60 N. W. 690.

Minnesota. Rock Island Plow Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

Mississippi. Saxony Mills v. Wagner, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899.

Missouri. Mergenthaler Linotype Co. v. Hays, 182 Mo. App. 113, 168 S. W. 239; F. N. Ellis Lumber Co. v. Johns, 152 Mo. App. 516, 133 S. W. 633; Greenbrier Distillery Co. v. Van Frank, 147 Mo. App. 204, 126 S. W. 222; Maxwell & Co. v. Edens, 65 Mo. App. 439; Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co., 60 Mo. App. 148.

New Jersey. Delaware & Hudson Canal Co. v. Mahlenbroek, 63 N. J. L. 281, 45 L. R. A. 538, 43 Ala. 978.

New York. Hovey v. De Long Hook & Eye Co., 211 N. Y. 420, 105 N. E. 667, rev'g 147 App. Div. 881, 133 N. Y. Supp. 25, which aff'd 126 N. Y. Supp. 1; Droege v. Ahrens & Ott Mfg. Co., 163 N. Y. 466, 57 N. E. 747, rev'g 34 App. Div. 631, 54 N. Y. Supp. 1099; St. Albans Beef Co. v. Aldridge, 112 App. Div. 803, 99 N. Y. Supp. 398; Harvard Co. v. Wicht, 99 App. Div. 507, 91 N. Y. Supp. 48; Vaughan Mach. Co. v. Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799; Tallapoosa Lumber Co. v. Holbert, 5 App. Div. 559, 39 N. Y. Supp. 432; Novelty Tufting Mach. Co. v. Hutkoff, 56 Misc. 522, 107 N. Y. Supp. 88; Vio Chemical Co. v. Studholme, 53 Misc. 470, 103 N. Y. Supp. 463; Crocker v. Muller, 40 Misc. 685, 83 N. Y. Supp. 189; Jones v. Keeler, 40 Misc. 221, 81 N. Y. Supp. 648; Waller v. Rothfield, 36 Misc. 177, 73 N. Y. Supp. 141; National Knitting Co. v. Bronner, 20 Misc. 125, 45 N. Y.

Supp. 714; American Broom & Brush Co. v. Addickes, 19 Misc. 36, 42 N. Y. Supp. 871; Murphy Varnish Co. v. Connell, 10 Misc. 553, 32 N. Y. Supp. 492; See Westerly Shirt Co. v. Kaufman, 145 N. Y. Supp. 68.

Ohio. Toledo Commercial Co. v. Glen Mfg. Co., 55 Ohio St. 217, 45 N. E. 197, distinguishing Western U. Tel. Co. v. Mayer, 28 Ohio St. 521.

Oklahoma. Harrell v. Peters Cartridge Co., 36 Okla. 684, 44 L. R. A. (N. S.) 1094, 129 Pac. 872.

Oregon. Bertin & Lepori v. Mattison, 69 Ore. 470, 139 Pac. 330.

Pennsylvania. Wolff Dryer Co. v. Bigler, 192 Pa. St. 466, 43 Atl. 1092; Mearshon & Co. v. Pottsville Lumber Co., 187 Pa. St. 12, 67 Am. St. Rep. 560, 40 Atl. 1019; Federal Glass Co. v. Lorentz, 49 Pa. Super. Ct. 585; New Jersey Steel Tube Co. v. Riehl, 9 Pa. Super. Ct. 220; Blakeslee Mfg. Co. v. Hilton Chemical Co., 5 Pa. Super. Ct. 184.

Texas. Allen v. Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Erwin v. E. I. Du Pont De Nemours Powder Co., — Tex. Civ. App. —, 156 S. W. 1097; Spindler v. Morrison (Tex. Civ. App.), 87 S. W. 378.

West Virginia. Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664.

See §§ 5770-5775, supra.

When one person travels through the country as an itinerant, exhibiting samples of goods and taking orders for goods of like character, and another follows in his wake, delivering the goods thus sold, both should be regarded as peddlers, when it appears that the business was thus conducted in pursuance of a scheme to evade the law of this state requiring peddlers to register and pay taxes. Duncan v. State, 105 Ga. 457, 30 S. E. 755.

the corporation in the foreign state, where they are passed upon and accepted or rejected, and if accepted the goods are shipped in the foreign state, consigned to the purchaser, it is held that this is not doing business in the state to which such goods are shipped within the meaning of a statute regulating foreign corporations doing business in the state, and that if such statute were intended to prohibit such taking of orders in the state by foreign corporations, until compliance with the regulations of the statute, it would be in conflict with the interstate commerce clause of the Federal Constitution.⁹²

By some statutes it is provided that their provisions shall not apply to drummers or traveling salesmen soliciting business in the state for foreign corporations which are entirely nonresident.⁹³ But even in the absence of such a provision, the statute will be construed not to apply to such business, unless from the terms of the statute it is plain that the legislature intended to include such business within the business which it attempted to prohibit from being done or carried on in the state.⁹⁴

§ 5923. Sales of goods. When a foreign corporation makes a sale in the state of goods to be shipped into the state from another state, it is engaged in interstate commerce, and the transaction does not

⁹² *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557.

In *Toledo Commercial Co. v. Glen Mfg. Co.*, 55 Ohio St. 217, 45 N. E. 197, the court said: "The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power. This rule does not deny the power of any state to impose conditions upon the right of foreign corporations to establish themselves within its boundaries for the performance, generally, of their business, involving the exercise of corporate franchises and powers, but does hold that the selling through traveling agents and delivering of goods manufactured outside of the state, does not fall directly within the purview of their corporate powers. The pertinent provision of the

Federal Constitution is that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states,' and that instrument gives to Congress power 'to regulate commerce * * * among the several states.' The distinction to be noted is that the sale and delivery of merchandise is a right possessed in common by all the citizens of the state. The exercise of the corporate franchises and powers is not. It is a special privilege conferred only upon corporations. And the sale and delivery in one state, of goods manufactured in another state, is interstate commerce."

⁹³ See *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557; *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683.

⁹⁴ *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557.

constitute doing business in the state within the meaning of a statute imposing regulations or restrictions upon the doing of business in the state by foreign corporations.⁹⁵ And the shipment of goods by a for-

95 United States. Parker-Washington Co. v. St. Louis, 245 U. S. 651, 62 L. Ed. 531 (mem. dec.); Interstate Amusement Co. v. Albert, 239 U. S. 560, 60 L. Ed. 439, aff'g 128 Tenn. 417, 161 S. W. 488; Rossi v. Pennsylvania, 238 U. S. 62, 59 L. Ed. 1201; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. Ed. 193, rev'g 28 S. D. 397, 133 N. W. 683; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. Ed. 189; Standard Oil Co. v. Tennessee, 217 U. S. 413, 54 L. Ed. 817, aff'g 120 Tenn. 86, 110 S. W. 565; International Text-Book Co. v. Pigg, 217 U. S. 91, 27 L. R. A. (N. S.) 493, 54 L. Ed. 678, 18 Ann. Cas. 1103; Swing v. Weston Lumber Co., 205 U. S. 275, 51 L. Ed. 799; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. Ed. 254; Brennan v. Titusville, 153 U. S. 289, 38 L. Ed. 719; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. Ed. 164; Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317; Stoutenburg v. Hennick, 129 U. S. 141, 32 L. Ed. 637; Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137; Vulcan Steam Shovel Co. v. Flanders, 205 Fed. 102; Williams v. American Chewing Gum Co., 192 Fed. 917; Parsons-Willis Lumber Co. v. Stuart, 182 Fed. 779; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, certiorari denied 212 U. S. 577, 53 L. Ed. 658 (mem. dec.); Kessler v. Perilloux, 127 Fed. 1011; Wagner v. J. & G. Meakin, 92 Fed. 76; Aultman, Miller & Co. v. Holder, 68 Fed. 467, aff'd 169 U. S. 81, 42 L. Ed. 669; New Orleans & Packet Co. v. James, 32 Fed. 21;

Williams v. Hintermeister, 26 Fed. 889.

Alabama. Foy Co. v. Haddock, 191 Ala. 101, 67 So. 978; American U. Tel. Co. v. Western U. Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Arkansas. Western U. Tel. Co. v. State, 82 Ark. 309, 101 S. W. 745; Gunn v. White Sew. Mach. Co., 57 Ark. 24, 18 L. R. A. 206, 38 Am. St. Rep. 223, 20 S. W. 591.

See W. T. Rawleigh Medical Co. v. Holcomb, 126 Ark. 597, 191 S. W. 215.

California. H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236.

Colorado. Savage v. Central Elec. Co., 59 Colo. 66, 148 Pac. 254; Herman Bros. v. Nasiacos, 46 Colo. 208, 103 Pac. 301; International Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 14 Ann. Cas. 861, 92 Pac. 727; Kindel v. Beck & Paul Lithographing Co., 19 Colo. 310, 24 L. R. A. 311, 35 Pac. 538; Utley v. Clark-Gardner Lode Min. Co., 4 Colo. 369; Fairbanks, Morse & Co. v. Macleod, 8 Colo. App. 190, 45 Pac. 282.

Florida. Circular Advertising Co. v. American Mercantile Co., 66 Fla. 96, 63 So. 3.

Idaho. Belle City Mfg. Co. v. Frizzell, 11 Idaho 1, 81 Pac. 58; In re Kinyon, 9 Idaho 642, 2 Ann. Cas. 699, 75 Pac. 268.

Illinois. American Art Works v. Chicago Picture Frame Works, 264 Ill. 610, 106 N. E. 443, aff'g 184 Ill. App. 502; Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248, aff'g 149 Ill. App. 360; Anderson Computing Scale Co. v. Hattenbach, 199 Ill. App. 467; Hamilton Machine Tool Co. v. Mechanics' Mach. Co., 179 Ill. App. 145; Havens & Geddes Co. v. Diamond, 93 Ill. App. 557.

eign corporation into a state on an order or contract therefor given

Kansas. John Deere Plow Co. v. Wyland, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863; State v. American Book Co., 65 Kan. 847, 69 Pac. 563.

Kentucky. Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774, 195 S. W. 139; Larkin Co. v. Com., 172 Ky. 106, 189 S. W. 3; Louisville Trust Co. v. Bayer Steam Soot Blower Co., 166 Ky. 744, 179 S. W. 1034; Ryman Steamboat Line Co. v. Com., 125 Ky. 253, 10 L. R. A. (N. S.) 1187, 101 S. W. 403; Com. v. Read Phosphate Co., 113 Ky. 32, 67 S. W. 45; Com. v. Felipe Hay Press Co., 31 Ky. L. Rep. 824, 104 S. W. 224; Com. v. Hogan, McMorrow & Tieke, 25 Ky. L. Rep. 41, 74 S. W. 737.

Maine. F. S. Royster Guano Co. v. Cole, 115 Me. 387, 99 Atl. 33.

Michigan. Standard Fashion Co. v. Cummings, 187 Mich. 196, L. R. A. 1916 F 329, Ann. Cas. 1916 E 413, 153 N. W. 814; Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399, 123 N. W. 769; Coit Co. v. Sutton, 102 Mich. 324, 25 L. R. A. 819, 60 N. W. 690.

Mississippi. See State v. Louisville & N. R. Co., 97 Miss. 35, Ann. Cas. 1912 C 1150, 51 So. 918, 53 So. 454; Western U. Tel. Co. v. Mississippi Railroad Commission, 74 Miss. 80, 21 So. 15.

Missouri. International Text Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922; State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902; Watkins v. Donnell, 192 Mo. App. 640, 179 S. W. 980; Watkins Medical Co. v. Holloway, 182 Mo. App. 140, 168 S. W. 290; Farrand Co. v. Walker, 169 Mo. App. 602, 155 S. W. 68; Westmoreland Specialty Co. v. Missouri Glass Co., 169 Mo. App. 368, 152 S. W. 387. Rogers v. Union Iron & Foundry Co., 167 Mo. App. 228, 150 S. W. 100; Fay Fruit Co. v. McKinney Bros. & Co., 103 Mo. App. 304, 77 S. W. 160.

Montana. Kent & Stanley Co. v. Tuttle, 20 Mont. 203, 50 Pac. 559; McNaughton Co. v. McGirl, 20 Mont. 124, 38 L. R. A. 367, 63 Am. St. Rep. 610, 49 Pac. 651.

New Mexico. Singer Mfg. Co. v. Hardee, 4 N. M. 676, 16 Pac. 605.

New York. People v. Wemple, 131 N. Y. 64, 27 Am. St. Rep. 542, 29 N. E. 1002; Hovey v. De Long Hook & Eye Mfg. Co., 147 App. Div. 881, 133 N. Y. Supp. 25; Hargraves Mills v. Harden, 25 Misc. 665, 56 N. Y. Supp. 937; Murphy Varnish Co. v. Connell, 10 Misc. 553, 32 N. Y. Supp. 492.

North Dakota. Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L. R. A. (N. S.) 134, 115 N. W. 844.

Ohio. Haldy v. Tomoor-Haldy Co., 3 Ohio N. P. 43.

Oklahoma. J. R. Watkins Medical Co. v. Coombes, 166 Pac. 1072; M. D. Wells Co. v. V. J. Howard & Co., 50 Okla. 766, 151 Pac. 616; Bledsoe & Son v. W. B. Young Supply Co., 44 Okla. 609, 145 Pac. 1125; Dr. Koch Vegetable Tea Co. v. Shumann, 42 Okla. 60, 139 Pac. 1133; Kibby v. Cubie, Heimann & Co., 41 Okla. 116, 137 Pac. 352; Freeman-Sipes Co. v. Corticelli Silk Co., 340 Okla. 229, 124 Pac. 972; Chicago Crayon Co. v. Rogers, 30 Okla. 299, 119 Pac. 630.

Pennsylvania. Wolff-Dryer Co. v. Bigler, 192 Pa. St. 466, 43 Atl. 1092; Mearshon & Co. v. Pottsville Lumber Co., 187 Pa. St. 12, 67 Am. St. Rep. 560, 40 Atl. 1019.

South Dakota. Rex Buggy Co. v. Dinneen, 23 S. D. 474, 122 N. W. 433; Flint & Walling Mfg. Co. v. McDonald, 21 S. D. 526, 14 L. R. A. (N. S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684; Jewett Bros. & Jewett v. Smail, 20 S. D. 232, 105 N. W. 738.

Tennessee. Milan Milling & Manufacturing Co. v. Gorten, 93 Tenn. 590, 26 L. R. A. 135, 27 S. W. 971.

out of the state or mailed to its office or place of business out of the state does not constitute the doing of business within the state,⁹⁶ within

Texas. *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714; *York Mfg. Co. v. Colley*, — Tex. Civ. App. —, 172 S. W. 206; *Dr. Koch Vegetable Tea Co. v. Malone*, — Tex. Civ. App. —, 163 S. W. 662; *Shaenfield & Hall Safe & Fixture Co.*, — Tex. Civ. App. —, 157 S. W. 462; *Erwin v. E. I. Du Pont De Nemours Powder Co.*, — Tex. Civ. App. —, 156 S. W. 1097; *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241, 54 S. W. 619; *Lasater v. Purcell Mill & Elevator Co.*, 22 Tex. Civ. App. 33, 54 S. W. 425; *Lewis v. W. R. Irby Cigar & Tobacco Co.* (Tex. Civ. App.), 45 S. W. 476; *Brin v. Wachussetts Shirt Co.* (Tex. Civ. App.), 43 S. W. 295; *American Starch Co. v. Bateman* (Tex. Civ. App.), 22 S. W. 771; *Lyons-Thomson Hardware Co. v. Reading Hardware Co.* (Tex. Civ. App.), 21 S. W. 300.

Vermont. *Kinnear & Gager Mfg. Co. v. Miner*, 89 Vt. 572, 96 Atl. 933; *Livingston Mfg. Co. v. Rizzi Bros.*, 86 Vt. 419, 85 Atl. 912.

Washington. *State v. Merrill*, 83 Wash. 8, 144 Pac. 925.

Wisconsin. *Stickney Co. v. Lynch*, 163 Wis. 353, 158 N. W. 85; *S. F. Bowser & Co. v. Schwartz*, 152 Wis. 408, 140 N. W. 51; *Southern Flour & Grain Co. v. McGeehan*, 144 Wis. 130, 128 N. W. 879; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 115 N. W. 829; *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888.

See §§ 5770-5775, *supra*.

96 United States. *Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co.*, 185 Fed. 431; *Bruner v. Kansas Moline Plow Co.*, 168 Fed. 218, modifying 7 Indian T. 506, 104 S. W. 816.

Idaho. *Foore v. Simon Piano Co.*,

18 Idaho 167, 108 Pac. 1038; *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 58.

Illinois. *John Spry Lumber Co. v. Chappell*, 184 Ill. 539, 56 N. E. 794; *Thomas Mfg. Co. v. Thede*, 186 Ill. App. 248; *Frank Prox Co. v. Bryan*, 185 Ill. App. 322; *Dean & Son, Ltd. v. W. B. Conkey Co.*, 180 Ill. App. 162; *Ajax-Grieb Rubber Co. v. Gray*, 179 Ill. App. 377; *Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145; *A. H. Woods Production Co. v. Chicago, C. & L. R. Co.*, 147 Ill. App. 568; *Yost Elec. Mfg. Co. v. Cavanaugh-Darley Co.*, 147 Ill. App. 418; *National Rolling Mill Co. v. Rubenstein*, 147 Ill. App. 84; *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557; *March-Davis Cycle Mfg. Co. v. Strobbridge Lithographing Co.*, 79 Ill. App. 683.

Indiana. *Mutual Mfg. Co. v. Alpaugh*, 174 Ind. 381, 91 N. E. 504, rehearing denied 92 N. E. 113.

Kansas. *Hessig-Ellis Drug Co. v. Sly*, 83 Kan. 60, Ann. Cas. 1912 A 551, 109 Pac. 770.

Missouri. *Kirkeby & Gundestrup Seed Co. v. White*, 168 Mo. App. 626, 153 S. W. 279; *Corn Products Mfg. Co. v. Western Candy & Bakers' Supply Co.*, 156 Mo. App. 110, 135 S. W. 985.

Montana. *Uihlein v. Caplice Commercial Co.*, 39 Mont. 327, 102 Pac. 564.

New Jersey. *Delaware & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 45 L. R. A. 538, 43 Atl. 978; *Falaenau v. Reliance Steel Foundry Co.*, 74 N. J. Eq. 325, 69 Atl. 1098.

New York. *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747, rev'g 34 App. Div. 631, 54 N. Y. Supp. 1099; *Acorn Brass Mfg. Co. v. Rutenberg*, 147 App. Div. 533, 132 N. Y.

the meaning of such statutes. If a statute should be construed as

Supp. 600; *L. C. Page & Co. v. Sherwood*, 146 App. Div. 618, 131 N. Y. Supp. 322, rev'g 125 N. Y. Supp. 1109; *Haddam Granite Co. v. Brooklyn Heights R. Co.*, 131 App. Div. 685, 116 N. Y. Supp. 96; *St. Albans Beef Co. v. Aldridge*, 112 App. Div. 803, 99 N. Y. Supp. 398; *Harvard Co. v. Wicht*, 99 App. Div. 507, 91 N. Y. Supp. 48; *Cummer Lumber Co. v. Associated Manufacturers' Mut. Fire Ins. Co.*, 67 App. Div. 151, 73 N. Y. Supp. 668 aff'd 173 N. Y. 633, 66 N. E. 1106; *Vaughn Mach. Co. v. Lighthouse*, 64 App. Div. 138, 71 N. Y. Supp. 799; *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559, 39 N. Y. Supp. 432; *Novelty Mfg. Co. v. Connell*, 88 Hun 254, 34 N. Y. Supp. 717; *American Case & Register Co. v. Griswold*, 68 Misc. 379, 125 N. Y. Supp. 4, rev'd 143 App. Div. 807, 128 N. Y. Supp. 206; *L. C. Page Co. v. Sherwood*, 65 Misc. 543, 120 N. Y. Supp. 837; *Fresno Home Packing Co. v. Turle & Skidmore*, 60 Misc. 79, 111 N. Y. Supp. 839; *Crocker v. Muller*, 40 Misc. 685, 83 N. Y. Supp. 189; *In re Simonds Furnace Co.*, 30 Misc. 209, 61 N. Y. Supp. 974; *American Broom & Brush Co. v. Addickes*, 19 Misc. 36, 42 N. Y. Supp. 871; *Murphy Varnish Co. v. Connell*, 10 Misc. 533, 32 N. Y. Supp. 492; *Briggs v. General Colonial Co., Inc.*, 168 N. Y. Supp. 74; *Osborne Co. v. Walters*, 155 N. Y. Supp. 434; *American Contractor Pub. Co. v. Michael Nocenti Co.*, 139 N. Y. Supp. 853; *Rundle Spence Mfg. Co. v. Gainsborough Const. Co.*, 123 N. Y. Supp. 785.

Oklahoma. *Fuller v. Allen*, 46 Okla. 417, 148 Pac. 1008; *Dr. Koch Vegetable Tea Co. v. Shumann*, 42 Okla. 60, 139 Pac. 1133.

Pennsylvania. *John Williams, Inc. v. Golden & Crick*, 247 Pa. 397, 93 Atl. 505; *Putney Shoe Co. v. Edwards*, 60 Pa. Super. Ct. 338; *Hall's Safe Co. v.*

Walenk, 42 Pa. Super. Ct. 576.

South Dakota. *Coffin v. Smith*, 26 S. D. 536, 128 N. W. 805.

Texas. *De Witt v. Berger Mfg. Co.* (Tex. Civ. App.), 81 S. W. 334; *Gale Mfg. Co. v. Finkelstein*, 22 Tex. Civ. App. 241, 54 S. W. 619; *H. Zuberbieber Co. v. Harris* (Tex. Civ. App.), 35 S. W. 403; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.* (Tex. Civ. App.), 21 S. W. 300.

Washington. *M. E. Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133.

This rule is not altered by the fact that the goods are shipped "f. o. b." a point in the state. *Coffin v. Smith*, 26 S. D. 536, 128 N. W. 805.

Where the transaction is, as a matter of fact, one of bargain and sale which is entered into at the home office of the corporation with the resident of another state for the delivery of goods to him, it is not to be considered as doing business in the latter state, though the agreement designates the purchaser as an agent and imposes restrictions upon him in regard to the price which he shall charge and the manner in which he may resell the goods. *W. T. Rawleigh Medical Co. v. Holcomb*, 126 Ark. 597, 191 S. W. 215.

To contract in one state to produce a play and to produce it in another state is not doing business in the latter state so as to require compliance with the statutory regulations applying to foreign corporations. *A. H. Woods Production Co. v. Chicago, C. & L. R. Co.*, 147 Ill. App. 568.

Where plaintiff, an English corporation, makes a written proposition to defendant in Chicago, which is subsequently accepted by defendant in New York, provided plaintiff agrees to certain changes, and plaintiff's managing director in New York agrees in writing to the modifications and the

applicable to such cases, it would be unconstitutional as an interference with interstate commerce.⁹⁷

Under a statute providing that every foreign corporation permitted to transact business in the state shall file its articles of association in the state and pay a franchise fee of a certain per cent on its authorized capital stock, and that all contracts made in the state by any foreign corporation doing business therein without having first complied with the provisions of the statute shall be wholly void, it was held that a contract between a foreign corporation and a citizen of the state, signed in the state by the parties thereto, the corporation signing by its agent, but which contained a provision that it should not be valid until countersigned by its manager in the state and approved at the office of the corporation in the state by which it was created, was not invalid, as the statute simply invalidated contracts made in the state, and the contract in question was not made in the state, but was consummated upon its approval at the office of the corporation in the foreign state.⁹⁸ But a sale made in the state by

contract is confirmed, as modified, by the plaintiff in London, the contract is not made in Illinois and plaintiff has not violated the act regulating foreign corporations doing business in Illinois. *Dean & Son, Ltd. v. W. B. Conkey Co.*, 180 Ill. App. 162.

The rule was also applied to a contract entered into in the state to be performed outside of it. *Briggs v. General Colonial Co., Inc.*, 168 N. Y. Supp. 74.

Where a foreign corporation which had for some time been doing business in another state without complying with the latter's statutes, desiring to withdraw from such business, wrote offering it for sale to a resident of the latter state who wrote the corporation's home office accepting the offer and enclosed his promissory note payable at the home office, the sale was held to constitute the doing of business in the state. *Hirschfeld v. McCullagh*, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1131.

⁹⁷ *McBath v. Jones Cotton Co.*, 149 Fed. 383; *Julius Kessler & Co. v. E. F. Perilloux & Co.*, 127 Fed. 1011;

DeWitt v. Berger Mfg. Co. (Tex. Civ. App.), 81 S. W. 334; *H. Zuberbieber Co. v. Harris* (Tex. Civ. App.), 35 S. W. 403; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.* (Tex. Civ. App.), 21 S. W. 300.

⁹⁸ *Holder v. Aultman*, 169 U. S. 81, 42 L. Ed. 669, aff'g 68 Fed. 467. See also *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 53; *Thomas Mfg. Co. v. Thede*, 186 Ill. App. 248; *West Coast Timber Co. v. Hughitt*, 185 Ill. App. 500; *American Sales Book Co. v. Wemple*, 168 Ill. App. 639; *Journal Printing Co. v. Inter-Ocean Newspaper Co.*, 167 Ill. App. 274; *J. B. Inderrieden Co. v. J. C. Johnson Co.*, 112 Minn. 469, 128 N. W. 570; *Low v. Davy*, 83 N. J. L. 540, 83 Atl. 869; *Belle Tel. Co. of Philadelphia v. Galen Hall Co.*, 77 N. J. L. 253, 72 Atl. 47; *Millikin v. Fullerton*, 101 N. Y. App. Div. 606, 91 N. Y. Supp. 1104; *Harvard v. Wicht*, 99 N. Y. App. Div. 507, 91 N. Y. Supp. 48; *American Case & Register Co. v. Griswold*, 68 N. Y. Misc. 379, 125 N. Y. Supp. 4; *Crocker v. Muller*, 40 N. Y. Misc. 685, 83 N. Y. Supp. 189; *Jones v. Keeler*,

the corporation's agent in the state who, at the time, delivers the

40 N. Y. Misc. 221, 81 N. Y. Supp. 648; *National Knitting Co. v. Bronner*, 20 N. Y. Misc. 125, 45 N. Y. Supp. 714; *American Broom & Brush Co. v. Addickes*, 19 N. Y. Misc. 36, 42 N. Y. Supp. 871; *American Contractor Pub. Co. v. Bagge*, 91 N. Y. Supp. 73; *Bertin & Lepori v. Mattison*, 69 Ore. 470, 139 Pac. 330; *M. E. Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133.

A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both. *Holder v. Aultman*, 169 U. S. 81, 42 L. Ed. 669, aff'g 68 Fed. 467.

A foreign corporation which manufactures farm machinery in the state of its domicile, and sells the same to citizens of another state upon orders to be approved by it, taken either by local or transient agents, and if approved, the machinery to be shipped into the latter state pursuant to such order, is not subject to the provisions of a statute of the latter state requiring a foreign corporation doing business in the state to have a designated place of business in the state, or file its articles of incorporation in certain offices in the state, or designate an agent upon whom process may be served, as the business so transacted is interstate commerce. *Belle City Mfg. Co. v. Frizzell*, 11 Idaho 1, 81 Pac. 58.

Where a foreign corporation places a machine on display with a company in the state, authorizing it to take orders and to sell the display machine under certain conditions, and a creditor of the company takes a machine in payment for a debt, which transaction the corporation immediately repudiates, demanding payment from the creditor whom it credits with a part payment made by the company,

such transaction does not constitute doing business in the state. *Hamilton Mach. Tool Co. v. Mechanics' Mach. Co.*, 179 Ill. App. 145. The court said that in "*Union Cloak & Suit Co. v. Carpenter*, 102 Ill. App. 339, it was held that a foreign corporation who sent its goods to its agent in this state, to be sold here at retail, was doing business in this state within the meaning of the statute. This case turned upon the fact that the goods were sent into this state by the owner, and here displayed and sold. The only difference in the conduct of business involved in the case at bar and the conduct of business * * * is, if the buyer did not or could not wait for the lathe, one of the sample lathes on display might, on approval of appellee, be shipped from Chicago. Since the proof shows that the lathe in question was the only one sold by McDowell Co. directly to a customer, which order was repudiated by appellee as soon as brought to its notice, we can see no difference in appellee's method of doing business than in the case of a traveling salesman or drummer taking orders * * * and the suit can be distinguished from the case of *Union Cloak & Suit Co. v. Carpenter*, supra, as in that case the goods were sent into the state to be exhibited and sold at retail and it is not in conflict with the recent case of *International Text-Book Co. v. Mueller*, 149 Ill. App. 509, as in that case one of the grounds for the holding that appellant therein was transacting business in the state in violation of the statute was that it maintained a distributing office in this state, where it shipped text-books in earload lots, which text-books were thereafter sent in single volumes by mail or express to its students residing within certain territory which consti-

goods to the purchaser and then forwards the contract to the corporation's district manager, who is also in the state, constitutes doing business in the state.⁹⁹

§ 5924. Consignment of goods to be sold on commission. According to the weight of authority, the consignment of goods by a foreign corporation to factors or to merchants in a state for sale by them on commission is not a doing of business in the state within the meaning of a statute imposing conditions upon which foreign corporations may do business within the state.¹ A foreign corporation which has no

tuted a part of the consideration for the correspondence course for which the students paid a certain sum of money."

However, it is held in Kansas that a Missouri corporation whose traveling salesmen solicit and receive orders in Kansas for intoxicating liquors, which orders when accepted by the corporation, are filled by shipping the liquors f. o. b. cars at St. Louis, Missouri, to the purchasers, is engaged in business in Kansas, and subject to the provisions of the statutes relating to foreign corporations doing business in the state. *State v. William J. Lemp Brewing Co.*, 79 Kan. 705, 29 L. R. A. (N. S.) 44, 102 Pac. 504.

⁹⁹ *Miellmeir v. Toledo Scales Co.*, — Ark. —, 193 S. W. 497.

1 United States. *Mitchell Wagon Co. v. Poole*, 235 Fed. 817; *In re Monongahela Distillery Co.*, 186 Fed. 220; *Atlas Engine Works v. Parkinson*, 161 Fed. 223; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1; *McBath v. Jones Cotton Co.*, 149 Fed. 383.

Illinois. See *Great Western Live Stock Commission Co. v. Great Western Commission Co.*, 187 Ill. App. 196; *Sleepy Eye Milling Co. v. Hartman*, 184 Ill. App. 308.

Kansas. See *Hessig-Ellis Drug Co. v. Sly*, 83 Kan. 60, Ann. Cas. 1912 A 551, 109 Pac. 770.

Kentucky. *Three States Buggy &*

Implement Co. v. Com., 32 Ky. L. Rep. 385, 105 S. W. 971. See, however, *Orr's Adm'r v. Orr*, 157 Ky. 570, 163 S. W. 757; *Milburn Wagon Co. v. Com.*, 31 Ky. L. Rep. 937, 104 S. W. 323.

Missouri. *Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.*, 193 Mo. App. 236, 182 S. W. 1036; *Corn Products Mfg. Co. v. Western Candy & Bakers' Supply Co.*, 156 Mo. App. 110, 135 S. W. 985.

New York. *Ang'dile Computing Scale Co. v. Gladstone*, 164 App. Div. 370, 149 N. Y. Supp. 807; *Brookford Mills v. Baldwin*, 154 App. Div. 553, 139 N. Y. Supp. 195; *Penn. Collieries Co. v. McKeever*, 93 App. Div. 303, 87 N. Y. Supp. 869, aff'd 183 N. Y. 98, 2 L. R. A. (N. S.) 127, 75 N. E. 935; *Badische Lederwerke v. Capitelli*, 92 Misc. 260, 155 N. Y. Supp. 651; *Alfred J. Brown Co. v. Richardson*, 53 Misc. 517, 103 N. Y. Supp. 243; *Waller v. Rothfield*, 36 Misc. 177, 73 N. Y. Supp. 141; *Bertha Zine & Mineral Co. v. Clute*, 7 Misc. 123, 27 N. Y. Supp. 542.

Tennessee. *I. J. Cooper Rubber Co. v. Johnson*, 133 Tenn. 562, L. R. A. 1917 A 282, 182 S. W. 593.

Texas. *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554, 80 S. W. 857; *Lasater v. Purcell Mill & Elevator Co.*, 22 Tex. Civ. App. 33, 54 S. W. 425;

warehouse, office or place of business, and which neither incurs nor pays any of the expenses of receiving, handling, storing or selling its goods in a state to which it consigns them to its factor, who conducts all the business there, assumes and pays all the expenses of receiving, selling, handling and storing the goods, is not doing business in the latter state within the meaning of the statutes relative to the admission of foreign corporations, as the making of contracts and their performance by the foreign corporation were transactions of interstate commerce.² The fact that the contract between the foreign corpora-

Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417.

See § 5773, *supra*.

Thus where a foreign corporation entered into a contract with a local commission merchant to sell vehicles on commission and placed vehicles in his hands for such purpose, it was held, in an action for the conversion of such vehicles, that the noncompliance of the corporation with the laws of the state requiring foreign corporations to file their articles of incorporation in the state before doing business therein was no defense to such action, as the foreign corporation was not doing business in the state within the meaning of such statute, but the sales were business of the merchant. *Allen v. Tyson-Jones Buggy Co.*, 91 Tex. 22, 40 S. W. 393, 714. See *Erwin v. E. I. Du Pont De Nemours Powder Co.*, — Tex. Civ. App. —, 156 S. W. 1097.

Under a statute authorizing service of process upon a foreign corporation "doing business and having a managing or business agent * * * within the state" by delivering a copy of the summons in an action to such managing or business agent, it was held that a commission broker who was furnished with prices by a foreign corporation which had declined to appoint him as its agent, but agreed to furnish him goods manufactured by it at such prices, and who in pursuance of such agreement found persons who

purchased goods from the corporation at such prices with a commission fixed by him added thereto to compensate him for procuring such buyers, which commission was paid to him by the corporation, was not the agent of the corporation within the meaning of such statute, as such broker "was a mere solicitor of business, working for a commission and not an 'officer or agent' within the meaning of those terms as used in the statute." *Doe v. Springfield Boiler & Manufacturing Co.*, 104 Fed. 684.

See §§ 5771-5773, *supra*.

See, however, in *re Nonantum Worsted Co.*, 15 Pa. Co. Rep. 125, holding that the consignment of goods to a commission merchant in the state who sells them for the corporation, and not on his own account, the corporation not "parting with the possession," is doing business in the state, and *Milsom Rendering & Fertilizer Co. v. Kelly*, 10 Pa. Super. Ct. 565, holding that the appointment by a foreign corporation of a local agent in a state and the consignment to him in carload lots of goods to be sold by him on commission was doing business in the state within the meaning of a statute requiring foreign corporations doing business in the state to have a known place of business therein and a resident agent thereat.

² *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1.

See §§ 5771-5773, *supra*.

tion and the one to whom the goods are consigned contains a provision that the latter shall keep the goods insured in the corporation's name and also a provision that adjustments with purchasers which may become necessary under the guaranty which the corporation gives of the quality of its goods shall be made out of the consigned goods belonging to the corporation do not render the transaction the doing of business in the state by the foreign corporation.³

§ 5925. Purchases within the state. The purchase by a foreign corporation of machinery to be manufactured in a state other than that by which it was created and to be transported from that state and set up and operated in another state is not a doing of business in the former state within the meaning of a statute prohibiting foreign corporations from doing business in the state before complying with certain requirements of the statute;⁴ nor is the purchase by a foreign corporation of oil within the state for shipment to its refineries in another state;⁵ nor is the making of a contract by a corporation in the state of its domicile for the purchase of lumber to be sawed and delivered for shipment in another state.⁶

On the other hand, it has been held that where a contract by a foreign corporation to purchase wheat was made in the state and the wheat was to be delivered to it and paid for within the state, the transaction constituted doing business in the state, even though the purchaser intended to ship it out of the state.⁷

³ *I. J. Cooper Rubber Co. v. Johnson*, 133 Tenn. 562, L. R. A. 1917 A 282, 182 S. W. 593.

⁴ *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; *Ware Cattle Co. v. Anderson*, 107 Iowa 231, 77 N. W. 1026. See also *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *McNaughton v. McGirl*, 20 Mont. 124, 38 L. R. A. 367, 63 Am. St. Rep. 610, 49 Pac. 651.

See §§ 5771-5774, *supra*.

⁵ *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

⁶ *Parsons-Willis Lumber Co. v. Stuart*, 182 Fed. 779.

See §§ 5771-5774, *supra*.

But it was held in Missouri that a foreign corporation which kept a resident agent in the state to make purchases of timber, who had an office in the state and who bought timber and lumber in the state and shipped it into the state by which the foreign corporation was created, and which had made a purchase of a tract of timberland in the state was doing business in the state. *Chicago Mill & Lumber Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128. See also *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139.

⁷ *Bondurant v. Dahnke-Walker Milling Co.*, 175 Ky. 774, 195 S. W. 139. The court said: "Where all of the contract, sale, and delivery are all made in the same state, such trans-

§ 5926. Contracts to sell and install machinery in another jurisdiction. It has been seen heretofore, there has been a difference of opinion as to whether a contract to furnish the material for machinery and erect or install the same in another jurisdiction constituted doing business in the state within the meaning of statutes imposing restrictions upon foreign corporations doing business in the state, some cases holding that sales of articles to be installed in such states even though they constituted doing business in the state, were nevertheless protected by the commerce clause of the Federal Constitution, while others hold that the commerce clause has no application.⁸

§ 5927. Soliciting traffic through traveling agents. A foreign corporation will not be deemed to be doing business in a state within the meaning of a statute requiring it to perform certain acts before doing business in such state merely because it sends therein persons to solicit traffic for it, whether such traffic be freight or passengers, where such persons are not authorized to enter into any contract to bind the company, or to receive and collect money for the transportation of freight or passengers, and their sole duty is to solicit traffic.⁹

action lacks all of the elements of the negotiations between the citizens of different states for the sale of goods then in one state, to be delivered in another, so as to invest it with the character of an interstate transaction. Such contracts have nothing to give them an interstate character. * * * All of the cited cases have been decisions arising under the laws and in the courts of the states wherein the delivery of the goods sold was made, and we have not been referred to any case wherein the contract, sale, and delivery of the goods was made wholly within one state, and of goods then in such state, and from a citizen of such state, where the transaction has been held to be one of interstate commerce, although the purchaser might contemplate removing the goods into another state after the sale and delivery to him."

In *Duluth Log Co. v. Pulpwood Co.*, 137 Minn. 312, 163 N. W. 520, it was held that a foreign corporation which

had an agent in the state to purchase lumber, such lumber being delivered in the state and the contracts therefor being forwarded to the corporation's home office for approval, was doing business in the state. The question involved was, however, whether jurisdiction of the corporation could be acquired by service on the agent.

⁸ See § 5774, *supra*.

⁹ *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, 1915 B. Ann. Cas. 77; *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, *aff'g* 147 Fed. 767; *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391; *Goeppfert v. Compagnie Générale Transatlantique*, 156 Fed. 196; *Abraham Bros. v. Southern R. Co.*, 149 Ala. 547, 42 So. 837. See also *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 Fed. 420, 38 L. R. A. 271; *Reynolds v. Missouri, K. & T. Ry. Co.*, 224 Mass. 379, 113 N. E. 413; *Berger v. Penn-*

§ 5928. Negotiations or bids preliminary to contract. Making a bid on public or private work or for supplying materials or articles in response to advertisements for bids therefor does not constitute doing business in the state within the meaning of statutes prohibiting foreign corporations from doing business in the state until compliance by them with certain conditions precedent to their right to do business in the state.¹⁰ Thus where it was sought to enjoin a municipal corporation from executing a contract with a foreign corporation which had been the successful bidder on public work on the ground that such corporation at the time of the making of the bid had not complied with the laws of the state prohibiting foreign corporations from doing business in the state until they complied with certain conditions precedent to the right to do business in the state, it was held that when the foreign corporation had complied with the prescribed conditions before the filing of the suit, an injunction would not be granted, as it was sufficient that it was duly qualified to transact business in the state at the time of the execution of the contract.¹¹

Pennsylvania R. Co., 27 R. I. 583, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941, 65 Atl. 261; *Atlantic Coast Line R. Co. v. Richardson*, 121 Tenn. 448, 117 S. W. 496.

See § 5767, *supra*.

10 District of Columbia. See *Ferguson Contracting Co. v. Coal & Coke Ry. Co.*, 33 App. Cas. 159.

Kansas. *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411.

Missouri. *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604; *Frazier v. Rockport*, 199 Mo. App. 80, 202 S. W. 266. See also *Wulfinger v. Armstrong Cork Co.*, 250 Mo. 723, 157 S. W. 615.

North Dakota. *Will v. Bismarek*, 36 N. D. 570, 163 N. W. 550.

Pennsylvania. *American Products Co. v. Philadelphia*, 15 Pa. Dist. 587.

11 American Products Co. v. Philadelphia, 15 Pa. Dist. 587. The court said: "The Supreme Court, in that case, *Delaware River Quarry & Construction Co. v. Bethlehem & N. Passenger R. Co.*, 204 Pa. 22, 53 Atl. 533, declared that the object of the Act of April 22, 1874, is to bring foreign cor-

porations doing business in this state within the reach of legal process, and that hence the registration must be had before the contract sought to be enforced is made. Interpreting the cases in the light of this decision, it seems clear that all the acts performed by a foreign company preliminary to and for the purpose of making a contract in Pennsylvania are not the transaction of business within the meaning of the Act of April 22, 1874. As the municipal corporation incurs no liability for the execution of this contract, it is not necessary to reach its bidders by legal process before that time. The law demands, however, that at the time of the execution of such contract the bidding foreign corporation shall be duly qualified to transact business in this state. The Penn Reduction Company having been so qualified in ample time before any contract was intended to be executed and a considerable time before the bill was filed, the plaintiff's complaint is unfounded." See, to the same effect, *Will v. Bismarek*, 36 N. D. 570, 163 N. W. 550.

§ 5929. Whether lending money constitutes doing business. A foreign corporation does not do business within a state within the

In *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604, in holding that a statute prohibiting a foreign corporation from transacting business in the state until it should have established a public office within the state, where books should be kept and process might be served, and should have procured a license to do business in the state, did not make illegal a contract by a municipal corporation for lighting its streets, entered into by it with a foreign corporation which had not complied with the requirements of the statute at the time it entered into such contract, which was made in pursuance of the acceptance of a bid made by the foreign corporation in response to advertisements therefor by the municipality, the court said: "Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this state, where books are kept and process may be served, and until it pays its quasi incorporation tax, and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that, when advertisements inviting bids on public and private works in this state are read by foreign corporations, they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No; that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts. Foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into

the state. It is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is 'transacting business,' within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used, it means carrying on the work for which the corporation was organized, and, in its application to the facts of this case, it means performing the work called for by the contract. The Kern Company, under the conditions stated in the petition, had the right to enter into the contract in question, and we hold it to be a legal and valid contract." Quoted with approval in *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411.

In *Frazier v. Rockport*, 199 Mo. App. 80, 202 S. W. 266, where the contract was one between a city and a foreign corporation, the question was whether the mere execution of the contract and bond before complying with the statutes rendered the contract void, notwithstanding the fact that as soon as the contract was executed and before any attempt was made to perform anything thereunder the company duly complied with the statutes, the court followed the ruling in the *Hogan* case, *supra*, quoting therefrom.

It was held in Kansas that the preliminary negotiation of a foreign corporation with the State Text-Book Commission, consisting of the advertisement by it for bids, the bid by the foreign corporation, the acceptance, the contract and the bond for supplying the public schools with text-books, did not constitute the doing of business within the state by such corporation within the meaning of the statutes of that state requiring foreign

meaning of statutes prohibiting foreign corporations from doing business in the state until they shall comply with certain statutory conditions, by making a loan to a resident of the state, where the agreement for the loan is made and the securities are delivered in another state, although the application may be made and negotiations carried on through a broker within the state.¹² And where a foreign

corporations seeking to do business therein to procure a certificate from the secretary of state that certain statements have been properly made. *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411, quoting with approval *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604.

12 United States. In re *Tennessee River Coal Co.*, 206 Fed. 802; *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, aff'g 163 Fed. 621; *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7. See also *Sullivan v. Sheehan*, 89 Fed. 247.

Alabama. *American Building, Loan & Tontine Sav. Ass'n v. Haley*, 132 Ala. 135, 31 So. 88; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751; *Covey Cotton Oil Co. v. Bank of Ft. Gaines*, — Ala. App. —, 74 So. 87, certiorari denied 75 So. 1003 (mem. dec.).

Arkansas. *Scruggs v. Scottish Mortg. Co.*, 54 Ark. 566, 16 S. W. 563.

Kentucky. *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

Louisiana. *American Freehold Land-Mortgage Co. of London v. Pierce*, 49 La. Ann. 390, 21 So. 972; *Scottish-American Mortg. Co. v. Ogden*, 49 La. Ann. 8, 21 So. 116; *Reeves v. Harper*, — La. Ann. 516, 9 So. 104.

New Jersey. *Manhattan & S. Sav. & Loan Ass'n of New York v. Arelli* (N. J. Ch.), 42 Atl. 284.

North Dakota. *United States Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006.

Pennsylvania. *New York & S. Const. Co. v. Winton*, 208 Pa. 467, 57 Atl. 955; *Bennett v. Eastern Building & Loan Ass'n*, 177 Pa. St. 233, 34 L. R. A. 595, 55 Am. St. Rep. 723, 35 Atl. 684. See also *People's Building, Loan & Saving Ass'n v. Berlin*, 201 Pa. 1, 88 Am. St. Rep. 764, 50 Atl. 308.

Tennessee. *Neal v. New Orleans Loan, Building & Savings Ass'n*, 100 Tenn. 607, 46 S. W. 755; *Norton v. Union Bank & Trust Co.*, 46 S. W. 544, aff'd orally by the Supreme Court of Tennessee, March 2, 1898. Compare *United States Saving & Loan Co. v. Miller*, 47 S. W. 17.

Texas. See *Brown v. Guarantee Savings, Loan & Investment Co.* (Tex. Civ. App.), 102 S. W. 138.

See § 5777, *supra*.

In *People's Building, Loan & Saving Ass'n v. Berlin*, 201 Pa. 1, 88 Am. St. Rep. 764, 50 Atl. 308, it was held that a New York building association did not do business in Pennsylvania merely by lending money to a member residing in Pennsylvania, and by taking a mortgage on his realty within the state. The further facts upon which the decision is predicated are found in the following language of the court: "As we have already seen, under the articles of association and by the by-laws, and as a matter of fact, the business of the association was done in New York. Its corporate functions were all exercised there. The applications for stock and for the loan were made and considered in New York and there accepted. By the express terms of the by-laws, the money

corporation, which has not complied with prohibitory and penal statutory regulations, makes an agreement with a citizen of a state to lend him money, which the citizen agrees to repay to the foreign corporation at its own domicile, and to secure that payment gives a mortgage upon lands situated in the state, there is no "carrying on of its business," or "doing" or "attempting to do any business" within the state.¹³ Nor is a foreign corporation doing business within a state, within the meaning of statutes, by receiving and discount-

paid by the stockholders and borrowers was to be paid there, as was also the payment of the money to the defendant by the association in completion of the transaction. In the contemplation of the law, the entire contract, from inception to the finish, was performed in New York. The opinion of the superior court seems to be grounded upon the assumption that the transaction involved the investment of employment of a part of the plaintiff's capital within the state of Pennsylvania. The money was, however, loaned on the bond, a New York contract, and the mortgage was given merely as security. The plaintiff took no title to any property in Pennsylvania by the transaction. It merely made a loan of part of its capital to one of its stockholders, who was a citizen of Pennsylvania. The capital, if employed, in the state of Pennsylvania, was so employed by a citizen of Pennsylvania, and not by the plaintiff corporation. In so far as the business of loaning money was concerned, it was carried on in the state of New York, and not in the state of Pennsylvania."

It is held in Louisiana that a foreign corporation lending money to a resident of that state, through brokers domiciled out of that state, does not come within the meaning of the Constitution of that state which prohibits a foreign corporation from doing business in the state without having one or more known places of business and an authorized agent or agents upon

whom process may be served. *American Freehold Land-Mortgage Co. of London v. Pierce*, 49 L. Ann. 390, 21 So. 972; *Scottish-American Mortg. Co. v. Ogden*, 49 La. Ann. 8, 21 So. 116; *Reeves v. Harper*, 43 La. Ann. 516, 9 So. 104.

A foreign corporation, engaged exclusively in the wholesale ice business, which makes a loan not connected in any way with its business, need not, in order to maintain an action to recover the sum lent, comply with General Corporation Law of New York, § 15, as such a loan does not come within the prohibition of such statute. *Commercial Coal & Ice Co. v. Polhemus*, 128 N. Y. App. Div. 247, 112 N. Y. Supp. 646.

The agreement in a deed of trust that the deed and the notes therein referred to, security for a loan from a foreign corporation to a citizen of Arkansas effected and payable in Louisiana, should be construed and governed by the laws of Arkansas, in which state the land covered by the deed was situated, is not an admission or agreement that the making of the contract evidenced by said notes and deed of trust was a doing or transacting of business in that state. *British & American Mortg. Co. v. Winchell*, 62 Ark. 160, 34 S. W. 891.

¹³ *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7; *Caesar v. Capell*, 83 Fed. 403, distinguishing *Carey-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743.

ing a note of a resident of the state, which is sent to it and is discounted by it in the state of its domicile.¹⁴ A foreign corporation organized for the purpose of constructing railroads and mining and transporting coal and other minerals is not doing business in a state within the meaning of a statute of such state requiring foreign corporations doing business therein to have a place of business in the state and an agent thereat for the service of process, where it makes a loan to a citizen of the state who is to use the proceeds thereof for the purpose of developing his coal and preparing it for delivery to the foreign corporation pursuant to an agreement between him and it that such proceeds of the loan should be so used, and the loan was secured by a mortgage on the land so to be developed.¹⁵ But where a domestic corporation, for the purpose of evading the domestic laws, causes a corporation to be created in a foreign state to finance the domestic corporation and the foreign corporation maintains an office and its officers reside in the domestic corporation's domiciliary state, the directorate of the two companies being practically identical, in carrying out the purposes of its creation the foreign corporation is doing business in the latter state.¹⁶

The making of a loan in the state, secured by mortgage on land in

¹⁴ *Bamberger v. Schoolfield*, 160 U. S. 149, 40 L. Ed. 374.

¹⁵ *New York & S. Const. Co. v. Winton*, 208 Pa. 467, 57 Atl. 955. The court said: "The construction company was not chartered to engage in the business of loaning money, and when it made this loan it was not doing business in contravention of the act of April 22, 1874 (P. L. 108). It was incorporated in the state of New Jersey for the purpose of constructing railroads and of mining and transporting coal and other minerals, etc. Had it employed its capital in carrying on this or any other business in this state, it would have brought itself within the prohibition of the statute. But the money sought to be recovered here was not invested or employed in this state in any business enterprise by the corporation. It was loaned to the appellant's decedent, a citizen of Pennsylvania, who employed it in his business for his own use and

benefit. While a corporation can have no legal existence beyond the sovereignty creating it, yet our state has recognized the comity existing among the several states of the Union which permits a corporation of one state to sue in a foreign jurisdiction. The exercise of such power by a foreign corporation is not regarded as prejudicial to the interests of the state nor repugnant to its policy. What our Constitution and the statute of 1874 prohibit is doing business in the state by a foreign corporation without having first complied with their provisions. We have already pointed out that the indebtedness attempted to be recovered here does not grow out of any business operations conducted or carried on by the appellee in this state." Quoted with approval in *Buffalo Refrigerating Mach. Co. v. Penn Heat & Power Co.*, 178 Fed. 696.

¹⁶ *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310.

the state, by a foreign corporation created for the purpose of lending money on real estate constitutes doing business in the state within the meaning of constitutional and statutory provisions requiring foreign corporations to have a known place of business and an authorized agent thereat in the state before doing any business therein.¹⁷

¹⁷ *Chattanooga Nat. Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870 (construing Alabama Constitution and statute); *Coburn v. Coke*, 193 Ala. 674, 69 So. 574; *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141, 18 So. 533; *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, 9 So. 141; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 So. 201; *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200; *People's Building, Loan & Savings Ass'n v. Markley*, 27 Ind. App. 128, 60 N. E. 1013; *Washington Nat. Building, Loan & Investment Ass'n v. Stanley*, 38 Ore. 319, 58 L. R. A. 816, 84 Am. St. Rep. 793, 63 Pac. 489.

In *British-American Mortg. Co. v. Jones*, 76 S. C. 218, 56 S. E. 983, 77 S. C. 443, 58 S. E. 417, the court said: "Section 1787 of the Code of Laws (Civ. Code 1902) is as follows: 'It shall be a further condition precedent to the right of any such (foreign) corporation to do business in this state, that it shall be taken and deemed to be the fact, irrebuttable, and part and parcel of all contracts entered into between such corporation and a citizen or corporation of this state, that the taking or receiving, from any citizen or corporation of this state of any charge, fee, payment, toll, impost, premium, or other moneyed or valuable consideration, under or in performance of any such contract or of any condition of the same, shall constitute the doing of its corporation business within this state, and that

the place of the making and of the performance of such contract shall be deemed and held to be within this state, anything contained in such contract, or any rules or by-laws of such corporation, to the contrary notwithstanding.' This section clearly shows that the petitioner was doing business in this state. Even if this statute had not been enacted, the exercise by the petitioner of the corporate functions hereinbefore mentioned, would have constituted the doing of business in this state. *Chattanooga Nat. B. & L. Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870, in which it was decided that the granting of a loan by a Tennessee building and loan association to a citizen of Alabama, upon the latter's signed application, solicited by a traveling agent for the association, and the taking of a note and mortgage executed within the state by the borrower as security, constitute, regardless of the form and terms of such instruments, the doing of business in the state, within the meaning of the Alabama Constitution and statutes, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and to have a known place of business within the state."

This was held true also of a loan secured merely by a note under seal. *Dundee Mortgage & Trust Inv. Co. v. Nixon*, 95 Ala. 318, 10 So. 311, holding further that the fact that the note was headed and dated as of a place in the state was prima facie evidence of its execution at such place.

And the facts that the notes and mortgage securing the loan are executed in the state, though payable elsewhere, and that the land covered by the mortgage is situated in the state are sufficient to show *prima facie* that the transaction involves the doing of business in the state by the lender and mortgagee.¹⁸

But a loan by a foreign corporation of a sum of money to a corporation in the state and taking a mortgage on the property of the borrower situated in the state to secure the loan, the mortgage being executed in the state by which the foreign corporation was created and the bonds to secure the loan and their coupons being also executed and payable in the last-mentioned state, does not come within the prohibition of constitutional and statutory requirements that no foreign corporation shall do any business in the state without having a known place of business therein and an agent thereat.¹⁹

¹⁸ *State v. Bristol Sav. Bank*, 108 Ala. 3, 54 Am. St. Rep. 141, 18 So. 533.

¹⁹ *Electric Lighting Co. v. Rust*, 117 Ala. 680, 23 So. 751.

"It is not disputed that this mortgage and deed of trust was executed outside of the state of Alabama and at Baltimore, Maryland, by one of these foreign corporations to the other foreign corporation. Such execution having been outside of Alabama, clearly such action cannot be said to have constituted 'engaging in or transacting any business in this state,' Alabama. It needs no argument to show that such transaction does not come within the terms of the statute or within the legislative contemplation, and that therefore the statute is not applicable to this case." Clayton, J., in *Continental Trust Co. v. Tallassee Falls Mfg. Co.*, 222 Fed. 694.

In *Covey Cotton Oil Co. v. Bank of Ft. Gaines*, — Ala. App. —, 74 So. 87, it was said: "The mere fact that Hobbs executed the mortgage in Alabama on property in Alabama to secure an indebtedness contracted in the state of Georgia to the plaintiff, a foreign corporation, cannot in any sense

be said to be the exercise of a corporate function by the corporation in this state. The act of executing the mortgage is the act of the mortgagor, and is a mere incident to the transaction, and could not become effective until its delivery to the mortgagee. In the recent case of *Citizens' National Bank v. Bucheit* (Ala.), 71 So. 82, we had occasion to consider this question, and there held that the fact that a note was executed and delivered to an agent of a foreign corporation for an indebtedness contracted in Tennessee was not doing business by the corporation in this state in violation of the statutes. This case has recently been reviewed by the Supreme Court and affirmed. And in the more recent case of *Puffer Mfg. Co. v. Kelley* (Ala.), 73 So. 403, * * * the Supreme Court holds that when an act, though done in this state, is a mere incident to the transaction of interstate commerce, it is not a violation of the statutes. While the mortgage is headed 'The State of Alabama, Barbour County,' the signature of the mortgagor is witnessed by 'W. L. Pullin, N. P., Clay County, Georgia.' So it cannot be said that the mortgage

§ 5930. Effect of taking negotiable security. The taking of a promissory note by a corporation in a state other than that by which it was created does not constitute a doing of business in such state within the meaning of a statute requiring compliance with its provisions by a foreign corporation doing business in such state.²⁰ Thus the drawing by a corporation of a bill of exchange upon residents of a state other than that by which the corporation was created, and the acceptance thereof by the drawees does not show that the corporation was engaged in business in the state within the meaning of such a statute.²¹ Nor does the taking by a foreign corporation of notes

shows on the face that it was executed in Alabama, and even if it did so appear on the face of the mortgage, it was permissible for the plaintiff to show that the 'business was transacted' in Georgia, and that the mortgage was there executed and delivered. It has been held that: 'There is no law which prohibits a foreign corporation to make loans in the course of business done in its home state on security consisting of lands in Alabama.' *American Banking, Loan and Tontine Savings Association v. Haley*, 132 Ala. 135, 31 So. 88; *Collier & Pinckard v. Davis Bros.*, 94 Ala. 456, 10 So. 86; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751."

²⁰ *United States. Wagner v. J. & G. Meakin*, 92 Fed. 76.

Alabama. *Holman v. Durham Buggy Co.*, 76 So. 914; *H. T. Woodall & Sons v. People's Nat. Bank of Leesburg, Virginia*, 153 Ala. 576, 45 So. 194.

Dakota. *Fuller & Johnson Mfg. Co. v. Foster*, 4 Dak. 329, 30 N. W. 166.

New York. *Creteau v. Foote & Thorne Glass Co.*, 40 App. Div. 215, 57 N. Y. Supp. 1103; *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559, 39 N. Y. Supp. 432.

Texas. *Norton v. W. H. Thomas & Sons Co. (Tex. Civ. App.)*, 93 S. W. 711.

"It has been several times held that the lending of money in Alabama by

a foreign corporation is a business transaction within the inhibition of the state laws referred to, and that a mortgage security therefor, on local property is not valid without precompliance with the laws. *Farrior v. N. E. M. S. Co.*, 88 Ala. 275, 7 South. 200; *State v. Bristol Sav. Bk.*, 108 Ala. 3, 18 South. 533, 54 Am. St. Rep. 141. But in those cases the invalidity of the security was clearly predicated upon the unlawful character of the business transaction—a direct exercise of corporate function—of which it formed a part. *Dudley v. Collier*, 87 Ala. 431, 6 South. 304, 13 Am. St. Rep. 55. On the other hand, our decisions have made it perfectly clear that the mere collection of validly created debts—and, a fortiori, their securement by note or otherwise—though within the general corporate powers, is not the transaction of corporate business within the meaning of our inhibitory laws. *Beard v. Union, etc., Pub. Co.*, 71 Ala. 80; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 15 South. 941, 25 L. R. A. 543; *Heflin Co. v. Hilton*, 124 Ala. 367, 27 South. 301; *State v. Anniston Rolling Mills*, 125 Ala. 121, 27 South. 921." *Somerville, J., in Holman v. Durham Buggy Co.*, — Ala. —, 76 So. 914.

²¹ *Wagner v. J. & G. Meakin*, 92 Fed. 76; *H. T. Woodall & Sons v. People's Nat. Bank of Leesburg*, 153 Ala. 576, 45 So. 194.

within a state for goods sold by it in the state of its domicile;²² nor for goods ordered and shipped into the state prior to the execution of the note;²³ nor does the receiving of a note in compromise of a claim against a resident of the state.²⁴

§ 5931. Purchase and ownership of property. A foreign corporation which has power under its charter to purchase and hold real and personal property may acquire the title to real estate in a state by a purchase made outside the state, where there is no law in such state which prohibits foreign corporations from purchasing and holding land and personal property in such state, and the purchase, being made outside of the state, does not constitute "the transaction of business within the state," within the meaning of a statute prohibiting the transaction of business in the state by a foreign corporation until it has complied with certain conditions precedent.²⁵ This applies also

²² *Holman v. Durham Buggy Co.*, — Ala. —, 76 So. 914; *Citizens' Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, certiorari denied 196 Ala. 700, 72 So. 1019; *Fuller & Johnson Mfg. Co. v. Foster*, 4 Dak. 329, 30 N. W. 166; see also *Tallapoosa Lumber Co. v. Holbert*, 5 N. Y. App. Div. 559, 39 N. Y. Supp. 432; *Brown v. Guarantee Savings, Loan & Investment Co.*, 45 Tex. Civ. App. 295, 102 S. W. 138.

The indorsement, in the state, to a foreign corporation of a note executed in the state is not a doing of business in the state within the prohibition of a statute prescribing conditions upon which foreign corporations may do business therein. *People's Sav. Bank of Bay City, Michigan, v. Fulton Contracting Co.*, 119 N. Y. Supp. 622.

Under a statute providing that no foreign corporation shall transact business or acquire, hold or dispose of property in the state until it shall have filed a copy of its charter and received a permit to do business in the state, and making void every contract relating to property within the state entered into by a foreign corporation prior to its compliance with

the statutory requirements, it was held in Florida that a note given for the purchase price of shares of the capital stock of the corporation which, in pursuance of a contract entered into in the state, were to be delivered to the makers of the note upon its payment by him, was void. *Ulmer v. First Nat. Bank*, 61 Fla. 460, 469, 55 So. 405, 408. By Laws Florida 1915 C 6876, No. 70, § 1, it is provided no violation of the act shall affect the title to property thus acquired, held or disposed of in violation of the statute.

²³ *Holman v. Durham Buggy Co.*, — Ala. —, 76 So. 914; *Citizens' Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, certiorari denied 196 Ala. 700, 72 So. 1019.

²⁴ *Creteau v. Foote & Thorne Glass Co.*, 40 N. Y. App. Div. 215, 57 N. Y. Supp. 1103; see *Holman v. Durham Buggy Co.*, — Ala. —, 76 So. 914.

²⁵ *Lakeview Land Co. v. San Antonio Traction Co.*, 95 Tex. 252, 66 S. W. 766; see also *Sullivan v. Sheehan*, 89 Fed. 247; *Rachels v. Stecher Coöperation Works*, 95 Ark. 6, 128 S. W. 343; *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22.

to dealings by a foreign corporation with citizens of other states in reference to property situated without the state, although the parties meet and draw up in the state the contract embodying their agreement with respect to such property.²⁶ And under a statute requiring every foreign corporation desiring to own property or carry on business in the state of any kind or character to first file in the office of the secretary of state a copy of its charter, and making it unlawful for any such corporation to do business or attempt to do business in the state without first having complied with the provisions of the statute, it was held that the purchase of real estate by a foreign corporation which had not complied with such statutory requirement was not carrying on business in the state within the meaning of such statute, and hence such corporation could maintain an action for damages to such real estate resulting from the change of the grade of a street by a municipality.²⁷

By passively continuing to hold in a state real estate acquired under a previously existing and valid lien and title, a foreign corporation is not transacting business in the state within the meaning of a statute providing that a foreign corporation while in default in compliance with certain statutory requirements, shall not transact business in the state. Such passivity is the negation of transaction of business.²⁸ Nor is a foreign corporation prevented, merely because it is foreign, from owning real estate or from enforcing and protecting its rights in reference to property so owned by it in the state.²⁹ And the care

"The mere purchase at execution sale of real property in satisfaction of a judgment procured on an interstate transaction is not in itself 'doing business in this state.' * * * The legislature has not undertaken to prohibit a corporation engaged in interstate business from taking title under judicial process in the collection of a debt where the corporation was not otherwise 'doing business' in this state within the meaning of the Constitution and statute." *Foore v. Simon Piano Co.*, 18 Idaho 167, 108 Pac. 1038.

A contract made by a foreign corporation not having complied with the laws of Tennessee with reference to property in that state is not void, if entered into outside of the state. In

re *Tennessee River Coal Co.*, 206 Fed. 802.

²⁶ *Hart v. Livermore Foundry & Machine Co.*, 72 Misc. 809, 17 So. 769.

²⁷ *Louisville Property Co. v. Nashville*, 114 Tenn. 213, 84 S. W. 810.

²⁸ *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 So. 940. See also *Broadway Bond St. Co. v. Fidelity Printing Co.*, 182 Mo. App. 309, 170 S. W. 394.

See §§ 5851-5859, *supra*, for right of foreign corporation to take and hold real and personal property.

²⁹ *Broadway Bond St. Co. v. Fidelity Printing Co.*, 182 Mo. App. 309, 170 S. W. 394. In this case it appeared that a Missouri corporation transferred its Missouri realty to a New York creditor to secure money ad-

and protection of unused property or payment of taxes which are a charge thereon, and the payment of which is essential to the preservation of the title to the owner is held to not constitute doing business in the state.³⁰ Nor is a foreign corporation doing business, within the meaning of a statute requiring a foreign corporation desiring to do business in the state to file a copy of its articles of incorporation and secure a permit, by reason of its ownership of a farm in the state and the lease thereof and the assignment of the rents and profits accruing under such lease.³¹ And the owning and leasing of its land in the state for agricultural purposes by a foreign corporation organized for the purpose of mining and selling coal and in manufacturing coke is not a transaction of business in the state within the meaning of a statute prohibiting foreign corporations from transacting business in the state until they have established a place of business therein, where such corporation had ceased its mining and manufacturing operations before the passage of the act imposing conditions upon its right to do business in the state.³²

But a foreign corporation which holds and manages land purchased by it in another state in the same manner as a resident owner would hold and manage it, having the deed and mortgage recorded in the state, leasing the property and offering it for sale, is engaged in business within the state, even though the formal instruments in respect to the land were executed in, and the operations regarding it were directed from, the corporation's domicile.³³ And the investing of

vanced to it by such creditor. Thereafter the creditor, for his own convenience, caused the property to be placed in the name of a New York corporation authorized to buy, sell, lease and deal in real estate in New York and elsewhere, the latter merely holding the bare legal title and not owning or having any interest in the property. The New York corporation having brought suit for rent against one of the tenants of the property and the tenant having denied its right to recover on the ground that plaintiff was a foreign corporation with no authority to do business in Missouri, it was held that in holding such property and protecting it the New York corporation was not doing business in Missouri.

³⁰ *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

³¹ *Wilson v. Peace*, 38 Tex. Civ. App. 234, 85 S. W. 31.

³² *Missouri Coal & Mining Co. v. Ladd*, 160 Mo. 435, 61 S. W. 191.

³³ *Weiser Land Co. v. Bohrer*, 78 Ore. 202, 152 Pac. 869. *McBride, J.*, said: "It is conceded that a single isolated instance of dealing is not within the statute. * * * But the present transaction is more than that. It was the evident intent of the plaintiff to engage in this state in the business of buying and selling in reference to this particular tract and to act as a landed proprietor in regard to it, and not only this, but to participate as a stockholder in the business

corporate capital in real estate and holding the title has been held to be "doing business" so as to render a foreign corporation liable to a license tax on corporations which do business in the state.⁵⁴ Where several persons, owning a building as tenants in common, organized a corporation for the purpose of acquiring title to such building, and such corporation, while it was empowered by its charter to deal generally in real and personal property of every kind in every jurisdiction, had no surplus and had all of its capital invested in such building and employed in the care and management of the building and the collection of rents realized therefrom, and the net proceeds from such building were declared as dividends by such corporation, it was held that it was doing business in the state within the meaning of the statutes thereof requiring foreign corporations doing business in the state to secure a permit to do business therein and pay a certain franchise tax upon its capital invested in the state.³⁵ A foreign cor-

of the Crystal District Improvement Company, whose object was to irrigate these and other lands.'

³⁴ *Greene v. Kentenia Corporation*, 175 Ky. 661, 194 S. W. 820. See also *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102.

In *Greene v. Kentenia Corporation*, 175 Ky. 661, 194 S. W. 820, the court said: "When plaintiff invested its capital in the coal and timber land which it purchased in this state, it did so for one of two purposes; that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it, or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this state. But, according to our conception, the land need not be in actual use in order to constitute doing business. The average speculator in land—and there are many of them—if asked in what business he was engaged would answer, 'speculating in land.' One of the definitions of business given by Mr. Webster is 'buying and

selling,' and when one, either as an individual or corporation, puts his money into land rather than other investments, his act is necessarily a choice between the various means open to him by which he may make his money yield him a profit. One of the definitions of 'invest' as given by Mr. Webster, is 'to lay out (money or capital) in business with the view of obtaining income or profit,' and to employ capital by investing it in land and not using the land is, according to our view, doing business within the sense of that term as used in the statute providing for the tax sought to be enjoined. * * * As seen, plaintiff employed its capital by investing it in real estate situated within this state. It then put its capital in motion, and as long as it remains so invested it is doing business for its owner." Compare *Singer Mfg. Co. v. Granite Spring Water Co.*, 66 N. Y. Misc. 595, 123 N. Y. Supp. 1088.

³⁵ *People v. Miller*, 181 N. Y. 328, 73 N. E. 1102, aff'g 98 N. Y. App. Div. 584, 90 N. Y. Supp. 755, and distinguishing *People v. Miller*, 179 N. Y. 49, 71 N. E. 463, and *People v. Roberts*, 157 N. Y. 676, 51 N. E. 1093; *People*

poration which receives by devise land situated in a state, with power under the will to sell and dispose of the same and to lease it and collect the rents and profits therefrom, and which asserts in such state ownership of such land and attempts to sell and convey it, and brings suit in the courts of the state in respect to such land and its ownership thereof and for the enforcement of contracts in regard to the same, will be held doing business within the state within the purview of a statute providing that foreign corporations doing business in the state shall be placed on an equality with domestic corporations and shall exercise no other or greater powers, and be subject to the same regulations and restrictions, and governed by the same rules of law in these respects as domestic corporations of like character.³⁶ A foreign corporation which makes a contract for the sale of land in the state owned by it on instalments which are made payable at an office maintained by it in the state is doing business in the state within the meaning of a statute providing that no foreign corporation shall do business in the state without having secured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business therein.³⁷ Furthermore the purchase of real estate by a foreign corporation may, though but a single transaction, constitute "doing business" where it is done for the purpose of transacting business in the state and is one of a series of acts looking to that end.³⁸

§ 5932. Maintaining an office or place of business in the state. A corporation may be deemed to be doing business in the state where it has an office and transacts therein a portion of the business for which it was incorporated.³⁹ And a foreign corporation engaged in

v. American Bell Tel. Co., 117 N. Y. 241, 22 N. E. 1057. See dissenting opinion of Cullen, C. J. and Gray & O'Brien, JJ.

See, as to foreign corporation leasing and subletting a building being engaged in business in the state, Cassidy's Limited v. Rowan, 99 N. Y. Misc. 274, 163 N. Y. Supp. 1079.

³⁶ Pennsylvania Company for Insurance of Lives, etc. v. Bauerle, 143 Ill. 459, 33 N. E. 166.

³⁷ Woodridge Heights Const. Co. v. Gippert, 92 N. Y. Misc. 204, 155 N. Y. Supp. 363.

³⁸ Donaldson v. Thousand Springs Power Co., 29 Idaho 735, 162 Pac. 334.

³⁹ F. N. Ellis Lumber Co. v. Johns, 152 Mo. App. 516, 113 S. W. 633; Stegall v. American Pigment & Chemical Co., 150 Mo. App. 251, 130 S. W. 144; Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915, aff'g 174 N. Y. App. Div. 866, 159 N. Y. Supp. 1145; South Bay Co. v. Howey, 190 N. Y. 240, 83 N. E. 26; People v. Wells, 183 N. Y. 264, 76 N. E. 24; East Coast Oil Co. v. Hollins, — N. Y.

selling meats and provisions at its office in the state will be presumed to be doing business in the state.⁴⁰ But the maintenance of an office in the state by a foreign corporation merely for the accommodation of its traveling salesmen does not constitute having an office for the transaction of business in the state within the meaning of a statute requiring every foreign stock corporation having an office for the transaction of business in the state to keep therein a stock book.⁴¹ A foreign corporation, engaged in the buying and selling

App. Div. —, 170 N. Y. Supp. 576; *American Case & Register Co. v. Griswold*, 143 N. Y. App. Div. 807, 128 N. Y. Supp. 206, rev'g 68 N. Y. Misc. 279, 125 N. Y. Supp. 4; *People v. Raymond*, 117 N. Y. App. Div. 62, 102 N. Y. Supp. 85; *Pittsburgh Elec. Specialties Co. v. Rosenbaum*, 102 N. Y. Misc. 520, 169 N. Y. Supp. 157; *Hyde v. Scott*, 75 N. Y. Misc. 487, 133 N. Y. Supp. 904; *Westerly Shirt Co. v. Kaufman*, 145 N. Y. Supp. 68; *Kimball v. Sundstrom & Stratton Co.*, 80 W. Va. 522, 92 S. E. 737.

Where a Pennsylvania corporation maintained a branch office in a loft in New York, which office bore the corporation's name and the sign "Shipping Department," had located there its general sales manager and six employees and carried a stock of its merchandise there from which, to some extent, orders were filled, and where it also appears that the corporation was listed in the New York telephone book, that it had special stationery for the branch, that a bank account was maintained in New York, under the name of an employee, for the benefit of the branch office, and customers had, in some instances, made payments at such office, it was held that such corporation was doing business in New York. *Pittsburgh Elec. Specialties Co. v. Rosenbaum*, 102 N. Y. Misc. 520, 169 N. Y. Supp. 157.

In *Interocean Forwarding Co., Inc. v. Charles R. McCormick & Co.*, 168 N.

Y. Supp. 177, aff'd — N. Y. App. Div. —, 169 N. Y. Supp. 1098, it appeared that a foreign corporation maintained an office in New York in charge of an agent who solicited business for it, the corporation's name appearing on the office door and stationery, that the rent, stenographer, telephone charges and incidental expenses were paid each month by the corporation, that the corporation had no bank account, money or other property in the state, except the office furniture, that its agent did business on his own account and with whomsoever it pleased him and had no authority to bind the corporation but submitted all inquiries and offers to it. It was held that the corporation was doing business in the state.

Even though a foreign corporation owns no property in New York, except an exhibition plant, and orders taken by its sales agents are subject to its approval at its home office, it is, nevertheless, doing business in New York, where its name is listed in the telephone book, its location and place of business being given at its New York office, and its local office is under the control of its sales manager who has under him a number of salesmen who are continuously employed in soliciting orders in the state. *Swift v. Matthews Engineering Co.*, 178 N. Y. App. Div. 201, 165 N. Y. Supp. 136.

⁴⁰ *Wilson & Co. v. Bazaar*, 168 N. Y. Supp. 188.

⁴¹ *American Art Works v. Chicago*

of lumber, which maintains an office in the state in charge of an agent who attends to purchases made by the foreign corporation in other states, but who makes no sales of lumber in the state is not doing business in the state within the meaning of a statute imposing restrictions upon the right of foreign corporations to do business in the state.⁴² On a motion to set aside service of summons upon a foreign corporation on the ground that it was not at the time of such service doing business within the state, it was held that where a foreign corporation had no office in the state, except for the registration of transfers of stock, the facts that the directors occasionally had met in the state at a private office of one of the directors, and that it kept a bank account in the state did not show that the corporation was doing business in the state at the time of such service of process, where it did not appear when the board of directors last met in the state or what was the subject of their deliberations at such meeting.⁴³ Nor

Picture Frame Works, 184 Ill. App. 502, aff'd 264 Ill. 610, 106 N. E. 440; Hovey v. De Long Hook & Eye Co., 211 N. Y. 420, 105 N. E. 667, rev'g 147 N. Y. App. Div. 881, 133 N. Y. Supp. 25, which aff'd 126 N. Y. Supp. 1.

A foreign corporation which sells its goods only on mail orders from customers sent to and filled by its home office is not doing business in the state, even though it advertises its goods by means of a traveling "showroom" in which samples of such goods are exhibited at various points in the state for four or five days at a time. Larkin Co. v. Com., 172 Ky. 106, 189 S. W. 3.

⁴² Advance Lumber Co. v. Moore, 126 Tenn. 313, 148 S. W. 212.

⁴³ Honeyman v. Colorado Fuel & Iron Co., 133 Fed. 96, quoting with approval People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; People v. Equitable Trust Co., 96 N. Y. 387, and People v. Feitner, 77 N. Y. App. Div. 189, 78 N. Y. Supp. 1017.

A foreign corporation will not be deemed to be doing business in the state, however, although it maintains an office therein, where the only func-

tions which it performs in the state are the holding of meetings of directors to declare dividends and the maintaining of cash in a bank in the state for the purpose of convenience in paying dividends. The court said: "This corporation was not doing business in the state of New York in the sense in which that term is used in the statute. The fact that it had an office here, and was authorized to do business, did not make it 'doing business.' The office which it had here was used simply for the purpose of enabling the directors to meet in it and declare dividends upon its preferred stock, and the cash on hand and money in bank are for the purpose of paying such dividends when declared. This is all the business it did in the state of New York, and this clearly did not bring it within the statutes making it liable to taxation." People v. Feitner, 77 N. Y. App. Div. 189, 78 N. Y. Supp. 1017, quoted with approval in Honeyman v. Colorado Iron & Fuel Co., 133 Fed. 96.

In considering, in People v. Equitable Trust Co., 96 N. Y. 387, the meaning of the words "doing business" in the state, Earl, J., expressly

will a foreign corporation be deemed to be doing business in the state where, although it has an office therein with agents to take orders, all orders taken must be approved at the home office out of the state, where also the goods are manufactured and paid for.⁴⁴ Where a for-

stating that the question did not arise, said: "Does it mean occasional or incidental corporate business, or continuous business substantially through the year? Does a corporation that keeps an office in this state merely for the record and transfer of its stock, while it does the business for which it was chartered elsewhere, do its corporate business within this state, within the meaning of the statute? Does a corporation which has an office in this state, from which its officers give some directions for the management of its corporate business, all of which is done elsewhere, carry on its corporate business in this state, any more than an individual carries on his business in this state who is engaged in the business of building a railroad in another state, over which he exercises some control by correspondence from his home here?"

⁴⁴ *People v. Wells*, 42 N. Y. Misc. 86, 85 N. Y. Supp. 533. See also *L. C. Page Co. v. Sherwood*, 65 N. Y. Misc. 543, 120 N. Y. Supp. 837; *Fresno Home Packing Co. v. Turle & Skidmore*, 60 N. Y. Misc. 79, 111 N. Y. Supp. 839; *System Co. v. Advertisers' Encyclopedia Co.*, 121 N. Y. Supp. 611.

See §§ 5770-5776, *supra*.

In *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, 2 L. R. A. (N. S.) 127, 75 N. E. 935, *aff'g* 93 N. Y. App. Div. 303, 87 N. Y. Supp. 869, the court said: "To be 'doing business in this state' implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances

which attest the corporate intent to avail itself of the privileges to carry on a business. In a very recent case it appeared that a foreign corporation having a manufacturing plant without the state maintained a salesroom in the city of New York to which some of its manufactures were consigned for distribution elsewhere, upon sales made at the home office, or for sales in that city, and it was sought to assess it, upon capital employed here, for a business franchise tax. It did not appear that anything was done here by the corporation beyond the mere maintenance of an office for such a purpose, and the determination turned upon whether the two essential conditions concurred of 'doing business in this state' and of some portion of its capital being employed here. We affirmed a determination made below that the corporation was not assessable, and necessarily that determination rested upon the insufficiency of the facts to establish that it was 'doing business' here. *People ex rel. A. J. Tower Co. v. Wells*, 182 N. Y. 553, 75 N. E. 1132, *aff'g* 98 App. Div. 82, 90 N. Y. S. 313."

Where contracts by an Illinois corporation for the sale of goods to New York purchasers are signed in New York and the goods are thereupon left with the purchasers and it appears that the corporation maintains a regular warehouse in New York and that all of its contracts are made in New York or all materials are delivered from the warehouse there, the corporation will be held to be doing business in New York, notwithstanding a printed clause in its contracts that

foreign corporation, engaged in the business of manufacturing and dealing in farm machinery in the state of its domicile and other states; maintains an agency in a state other than that of its domicile for the purpose of receiving, storing, and delivering goods to purchasers in the state where such agency was maintained, to whom sales were made by orders taken by traveling salesmen, subject to the approval of the foreign corporation at its home office in the state of its domicile, and the agent in the state where such agency was maintained had no authority to make sales of property stored with it or to take orders therefor, but his authority was limited exclusively to delivering goods previously sold by the foreign corporation through its traveling salesmen, it was held that the foreign corporation was not doing business in the state within the meaning of the statutes of the state imposing certain conditions precedent to the right of foreign corporations to do business in the state, as the business so conducted constituted interstate commerce.⁴⁵

they are subject to the corporation's approval, where there is nothing to show that such approval is to be given at the home office. *American Can Co. v. Grassi Contracting Co.*, 102 N. Y. Misc. 230, 168 N. Y. Supp. 689.

A foreign mining corporation whose property is located and business done in its domestic state and the greater part of whose directors reside in that and other states cannot be said to be doing business in another state by reason of the fact that, for convenience in the conduct of its internal affairs, it maintains an office in the latter state, leased in its treasurer's name, and has therein some office furniture, the only property which it has in the state. *People v. Mascot Copper Co.*, 202 Ill. App. 151.

⁴⁵ *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616, distinguishing *Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441. *Brown, J.*, said: "The warehouse company in Minneapolis was the agent of plaintiff in this state for the purpose of performance only, clothed with the naked power and authority to deliver the goods, and to deliver to other

customers goods stored with it when directed and ordered so to do. It was a mere distributing agency. The case would be substantially the same if the goods had been consigned to the plaintiff itself at Minneapolis, and by some other agent reshipped to defendant. It comes, it seems clear to us, squarely within the case of *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336. That case involved substantially the question here presented. It appeared in that case that a portrait company carrying on business in one state had obtained orders through an agent in another state for pictures and frames, and, in filling the orders, shipped the pictures and frames in separate packages, for convenience in packing and handling, to its own agent in the state where the orders were obtained, who placed the pictures in their proper frames, and delivered them to the persons ordering them. The court held that the transaction came within the protection of the commerce clause of the Federal Constitution, and was not doing business in the foreign state in violation of a statute similar to our own. In the case at bar, as we have

In order that a foreign corporation may be regarded as doing business within a state, so as to come within the purview of a statute prohibiting foreign corporations from "doing business" in a state without first complying with conditions imposed by the statute or with a statute imposing a tax or license fee upon such corporations, it is not necessary that it shall have its principal office there, or that it shall do the greater part of its business there.⁴⁶ Where a foreign

already stated, the fair inference from the findings of the trial court is that plaintiff shipped its goods into this state, after receiving orders therefor from customers, to its agent, the warehouse company at Minneapolis, to be by it reshipped and delivered to customers, 'bundled and packed' as originally received by it. The power of the warehouse company was limited to reshipping and delivering goods consigned to it for that purpose. It had no power to take orders or sell or deliver goods, otherwise than as directed. The case of Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441, relied upon by defendant, is not in point. In that case the brewing company was a corporation created and doing business under the laws of Wisconsin, manufacturing beer for sale to customers in that and other states. It maintained a warehouse at Waterville, in this state, where large quantities of beer and liquors were stored and sold by an agent of the company resident at Waterville, but not, as in the case at bar, upon orders taken by traveling salesmen. In that case the agent had full power to sell and dispose of the liquors in his charge, and to receive payment therefor. The cases are clearly distinguishable."

See also *J. B. Inderrieden Co. v. J. C. Johnson Co.*, 112 Minn. 469, 128 N. W. 570. See, however, *Elliott v. Parlin & Orendorff*, 71 Kan. 665, 81 Pac. 500; *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989.

See § 5772, *supra*.

The mere occupancy by a foreign

corporation of a warehouse from which its goods are shipped does not constitute the doing of business in the state in which the warehouse is located, where it appears that all contracts for the sale of its goods were submitted to and completed by the corporation's home office. *Thomas Mfg. Co. v. Thede*, 186 Ill. App. 248.

⁴⁶ *People v. Equitable Trust Co.*, 96 N. Y. 387, quoted with approval in *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

Under a statute imposing a tax upon foreign corporations doing business in the state, it was held that while keeping an office in the state where meetings of the directors were held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation was done, might not bring the corporation within the statute, yet when all these things were done, and in addition thereto a substantial part of the regular business of the corporation was carried on in the state, such facts would bring the corporation within the statute, as one "doing business" in the state. *People v. Horn Silver Min. Co.*, 105 N. Y. 76, 11 N. E. 155, quoted with approval in *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

See also *Neyens v. Worthington*, 150 Mich. 580, 18 L. R. A. (N. S.) 142, 114 N. W. 404; *Interocean Forwarding Co., Inc. v. Charles R. McCormick & Co.*, 168 N. Y. Supp. 177, aff'd — N. Y. App. Div. —, 169 N. Y. Supp. 1098 (mem. dec.); *International Text-Book*

corporation organized for the purpose of transacting a real estate brokerage business maintains a general office in the state and not merely solicits residents of the state to purchase real estate, but actually executes within the state contracts for such purchases, it is engaged in doing business in the state.⁴⁷ It is not necessary, however, that a foreign corporation have an office in the state in order to come within the purview of such a statute. By the weight of authority, it is within the statute, if it does any part of its ordinary business in the state, whether it has an office there or not.⁴⁸

§ 5933. Foreign corporation becoming member of partnership doing business in the state. A foreign corporation which becomes a special partner in a limited partnership, and which contributes to the capital of such partnership is doing business in the state, within the purview of a statute imposing a tax on the franchise or business of every foreign corporation doing business in the state, the basis for the tax being "the amount of capital stock employed within this state," and the tax to be paid by such corporation must be based on the amount of its contribution to the capital of the copartnership.⁴⁹

Co. v. Lynch, 81 Vt. 101, 69 Atl. 541; *Kimball v. Sundstrom & Stratton Co.*, 80 W. Va. 522, 92 S. E. 737; *International Text-Book Co. v. Peterson*, 133 Wis. 302, 14 Ann. Cas. 965, 113 N. W. 730.

On a motion to set aside a service of summons, it was held that a foreign corporation is doing business in the state for the purposes of suit against it where it maintains a sales agent in the state who has power to make binding contracts with purchasers, and who sends to the state where the orders are filled merely directions where to ship the goods. *Irons v. Rogers*, 166 Fed. 781.

⁴⁷ *Warren v. Interstate Realty Co.*, 192 Ill. App. 438. See *Woodridge Heights Const. Co. v. Gippert*, 92 N. Y. Misc. 204, 155 N. Y. Supp. 363.

⁴⁸ *Farrior v. New England Mortg. Security Co.*, 88 Ala. 275, 7 So. 200; *Ginn v. New England Mortg. Security Co.*, 92 Ala. 135, 8 So. 388; *Alpena Portland Cement Co. v. Jenkins &*

Reynolds Co., 244 Ill. 354, 91 N. E. 480; *People v. Wemple*, 131 N. Y. 64, 27 Am. St. Rep. 542, 29 N. E. 1002; *People v. Horn Silver Min. Co.*, 105 N. Y. 76, 11 N. E. 155. See also *Lamb v. Lamb*, 6 Biss. 420, Fed. Cas. No. 8,018; *International Text-Book Co. v. Lynch*, 81 Vt. 101, 69 Atl. 541.

"It is not necessary that a foreign corporation maintain an office in this state in order to transact business here and to come within the prohibition of the statute." *Page, J., Woodridge Heights Const. Co. v. Gippert*, 92 N. Y. Misc. 204, 155 N. Y. Supp. 363.

See, however, *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, aff'g 163 Fed. 621.

⁴⁹ *People v. Roberts*, 152 N. Y. 59, 36 L. R. A. 756, 46 N. E. 161, aff'g 11 N. Y. App. Div. 310, 42 N. Y. Supp. 502, in holding that a foreign corporation cannot be deemed to be doing business in the state by virtue solely of the fact that it is interested as a

§ 5934. Contract by individual succeeding corporation. Where a foreign corporation which was preparing a book for publication, and was securing contracts for advertising space, transferred its rights to an individual, agreeing that he should have the right to publish the book, and to make all contracts in connection therewith, in the

special partner in a limited partnership in the state the court said: "The argument may fairly be summarized in this way: That, as the tax is upon the right to do business within the state, it must appear that the corporation is actually, as such, engaged in the transaction of its business here, and that the condition of the law is not met when it is made to appear that there has been only an investment of capital within this state, in a business which other parties alone control and manage. While it is very true that a corporate business must be found to be transacted here in order that a tax may be imposed, still I think we may look through the form and regard the substance of the transaction in question. If agencies are adopted, not independent, but of which, in fact, the foreign corporation is a member, and through which its business is done, can we and should we say that in that way it has placed itself beyond the reach of the taxing officer? In a broad sense, all persons may be said to be doing business where their capital is placed; and that they have stipulated for a contractual relation, whereby their powers of control and administration are restricted, may affect, but does not change, the fact. The idea in the formation of a limited partnership is the transaction of a business by the parties who enter it, under certain conditions, the performance of which will exempt the special partner from liability for the debts of the partnership beyond the fund contributed by him to the capital. It would be difficult to say that a special partner was not engaged in

the transaction of business as an inference from the statutory provisions which create the limited liability. In this case the corporation has placed \$150,000 with a firm in New York City, of which it assumed to become a member. The business of that firm was the importation of chemicals, and all the sales of the relator's manufactured products within this state are made by or through this firm. It must be assumed that the relator's contribution of capital is an efficient cause in this profitable marketing of its products here; and while, as a special partner, it may be under limitations and restrictions with respect to partnership powers, yet (and we are assuming for the purpose of the discussion that the relator may validly enter into the partnership) the relator is present here as a member of the partnership, or is deemed in the eye of the law to be here for certain purposes. In that guise it is employing some portion of its capital, and the question in reality becomes one of the nature of the agency availed of by the relator for the purpose of carrying on its business of marketing its manufactured products within this state. It has, in effect, by this method of a limited partnership, established a place within this state for the doing of a part of its business, and, though I come to the conclusion with some hesitation, I think that it may be regarded as coming within the operation of the statute."

See *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841. See also § 5966, *infra*.

name of the corporation, it was held that contracts afterwards made by an agent of the individual on his behalf, although in the name of the corporation, for advertising space, was his contract and not the contract of the corporation, and therefore that an action by him thereon could not be defeated by setting up the failure of the corporation to comply with the statute to entitle it to do business in the state.⁵⁰

§ 5935. Institution or defense of suits not doing business. The mere prosecuting or defending of suits by a foreign corporation in the courts of a state is not within a constitutional or statutory provision prohibiting foreign corporations from doing business in the state or imposing conditions on their right to do so.⁵¹ Thus a suit

⁵⁰ Nicoll v. Clark, 13 N. Y. Misc. 128, 34 N. Y. Supp. 159.

See § 5965, *infra*.

⁵¹ **United States.** Meader Furniture Co. v. Commercial Nat. Safe Deposit Co., 192 Fed. 616; Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co., 183 Fed. 645; Richmond Cedar Works v. Buckner, 181 Fed. 424; United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York, 181 Fed. 182; Colby v. Cleaver, 169 Fed. 206; Vitagraph Co. of America v. Twentieth Century Optiscope Co., 157 Fed. 699; Ladd Metals Co. v. American Min. Co., 152 Fed. 1008; Robinson v. American Linseed Co., 147 Fed. 885; American Loan & Trust Co. v. East & West B. Co., 37 Fed. 242; Orange Nat. Bank v. Traver, 7 Sawy. 210, 7 Fed. 146.

Alabama. Ashurst v. Arnold-Henegar-Doyle Co., 78 So. 386; Worth v. Knickerbocker Trust Co., 171 Ala. 621, 55 So. 144; Woodall & Son v. People's Nat. Bank of Leesburg, Virginia, 153 Ala. 576, 45 So. 194; Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 573, 15 So. 941; McCall v. American Freehold Land Mortg. Co., 99 Ala. 427, 12 So. 806; Cook v. Rome Brick Co., 98 Ala. 409, 12 So. 918; Boulden v. Estey Organ Co., 92 Ala. 182, 9 So. 283; Ginn v. New England Mortg.

Security Co., 92 Ala. 135, 8 So. 388; Boulware v. Davis, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; Christian v. American Freehold Land & Mortgage Co., 89 Ala. 198, 7 So. 427; Empire Clothing Co. v. Roberts, Johnson & Rand Shoe Co., — Ala. App. —, 75 So. 634.

Alaska. First Nat. Bank of Seattle v. Fish, 2 Alaska 344.

Arizona. Martin v. Bankers' Trust Co., 18 Ariz. 55, 156 Pac. 87.

Arkansas. Hooker v. Southwestern Improvement Ass'n, 105 Ark. 99, 150 S. W. 398; A. H. Andrews Co. v. Delight Special School Dist., 95 Ark. 26, 128 S. W. 361; Rachels v. Stecher Cooperage Works, 95 Ark 6, 128 S. W. 348; Jones v. Southern Cooperage Co., 94 Ark. 621, 127 S. W. 704; Alley v. Bowen-Merrill Co., 76 Ark. 4, 113 Am. St. Rep. 73, 6 Ann. Cas. 127, 88 S. W. 838; Buffalo Zinc & Copper Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; White River Lumber Co. v. Southwestern Improvement Ass'n, 55 Ark. 625, 18 S. W. 1055; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

California. General Conference of Free Baptists v. Berkeley, 156 Cal. 466, 105 Pac. 411, citing Clark & M., Priv. Corp., § 860; Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

by a foreign corporation against an insurance company in the state

Colorado. Desserich v. Merle & Heaney Mfg. Co., 48 Colo. 370, 109 Pac. 949; Edward Malley Co. v. Londoner, 41 Colo. 436, 93 Pac. 488; International Trust Co. v. A. Leschen & Sons Rope Co., 41 Colo. 299, 14 Ann. Cas. 861, 92 Pac. 727; Craig v. A. Leschen & Sons Rope Co., 38 Colo. 115, 87 Pac. 1143; Kephart v. People, 28 Colo. 73, 62 Pac. 946; Kindel v. Beek & Pauli Lithographing Co., 19 Colo. 310, 24 L. R. A. 311, 35 Pac. 538; Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 Pac. 537; Utley v. Clark-Gardner Lode Min. Co., 4 Colo. 369; Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667.

Dakota. Fuller & Johnson Mfg. Co. v. Foster, 4 Dak. 329, 30 N. W. 166; American Button-Hole Overseaming & Sew. Mach. Co. v. Moore, 2 Dak. 280, 8 N. W. 131.

Florida. See Farrell v. Forest Inv. Co., 74 So. 216; Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 46 So. 185.

Idaho. Diamond Bank v. Van Meter, 19 Idaho 225, 113 Pac. 97; Bonham Nat. Bank of Fairbury v. Grimes Pass Placer Min. Co., 18 Idaho 629, 111 Pac. 1078; War Eagle Consol. Min. Co. v. Dickie, 14 Idaho 534, 94 Pac. 1034.

Illinois. Hunter W. Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521, aff'g 146 Ill. App. 257; Edwards v. Schillinger, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227; Alpena Portland Cement Co. v. Jenkins & Reynolds Co., 244 Ill. 354, 91 N. E. 480; McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850, aff'g 125 Ill. App. 119; John Spry Lumber Co. v. Chapell, 184 Ill. 539, 56 N. E. 794, aff'g 85 Ill. App. 223; Morse v. Holland Trust Co., 184 Ill. 255, 56 N. E. 369, aff'g 84 Ill. App. 84; Mandel v. Swan

Land & Cattle Co., Ltd., 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204; Journal Co. of Troy v. F. A. L. Motor Co., 181 Ill. App. 530; Delta Bag. Co. v. Kearns, 160 Ill. App. 93; Pressed Radiator Co. v. Hughes, 155 Ill. App. 80; De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356; Havens & Geddes Co. v. Diamond, 93 Ill. App. 557.

Indian Territory. T. H. Rogers Lumber Co. v. McRea, 7 Indian T. 468, 104 S. W. 803.

Indiana. Smith v. Little, 67 Ind. 549.

Iowa. Ware Cattle Co. v. Anderson, 107 Iowa 231, 77 N. W. 1026.

Kansas. See John T. Stewart Estate v. Falkenberg, 82 Kan. 576, 109 Pac. 170.

Mississippi. State v. Scottish-American Mortg. Co., 111 Miss. 98, 71 So. 291; Swing v. Brister, 87 Miss. 516, 6 Ann. Cas. 740, 40 So. 146.

Missouri. United Shoe Machinery Co. v. Ramlose, 231 Mo. 508, 132 S. W. 1133; International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922; Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; Groneweg & Schmoentgen Co. v. Estes, 139 Mo. App. 36, 119 S. W. 513; Henderson Woolen Mills v. Edwards, 84 Mo. App. 448.

Montana. Uihlein v. Caplice Commercial Co., 39 Mont. 327, 102 Pac. 564; Powder River Cattle Co. v. Custer County Com'rs, 9 Mont. 145, 22 Pac. 383.

Nebraska. Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839.

Nevada. See United States Fidelity & Guaranty Co. v. Marks, 37 Nev. 306, 142 Pac. 524.

New Hampshire. South Bay Co. v. Merrill, 77 N. H. 1, 86 Atl. 351; Con-

on a policy of insurance, where the only business done by the plaintiff

necticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622.

New Jersey. *M. B. Faxon Co. v. Lovett Co.*, 60 N. J. L. 128, 36 Atl. 692; *Manhattan & S. Savings & Loan Ass'n of New York v. Massarelli* (N. J. Eq.), 42 Atl. 284.

New Mexico. *Probst v. Trustees of Board of Domestic Missions*, 3 N. M. 237, 5 Pac. 702.

New York. *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26; *Joseph Schlitz Brewing Co. v. Ester*, 157 N. Y. 714, 53 N. E. 1126; *Bard v. Poole*, 12 N. Y. 495; *Bremer v. Ring*, 146 App. Div. 724, 131 N. Y. Supp. 487; *Great Northern Moulding Co. v. Bone-wur*, 128 App. Div. 831, 113 N. Y. Supp. 60; *Union Trust Co. of Rochester v. Sickels*, 125 App. Div. 105, 109 N. Y. Supp. 262; *Portland Co. v. Hall & Grant Const. Co.*, 121 App. Div. 779, 106 N. Y. Supp. 649, rehearing granted 123 App. Div. 495, 108 N. Y. Supp. 821; *Aiken, Lambert & Co v. Haskins*, 48 App. Div. 638, 63 N. Y. Supp. 1104; *American Ink Co. v. Riegel Sack Co.* 79 Misc. 421, 140 N. Y. Supp. 107, aff'g 141 N. Y. Supp. 549; *International Textbook Co. v. Connelly*, 67 Misc. 49, 124 N. Y. Supp. 603, aff'd 140 App. Div. 939, 125 N. Y. Supp. 1125; *Fresno Home Packing Co. v. Turle & Skidmore Co.*, 60 Misc. 79, 111 N. Y. Supp. 839, aff'd 132 App. Div. 930, 117 N. Y. Supp. 1134; *Citizens State Bank v. Kelly*, 48 Misc. 366; *American Typefounders Co. v. Conner*, 6 Misc. 391, 26 N. Y. Supp. 742.

North Dakota. *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285.

Oklahoma. *J. P. Bledsoe & Son v. W. B. Young Supply Co.*, 44 Okla. 609, 145 Pac. 1125; *Freeman-Sipes Co. v. Corticelli Silk Co.*, 34 Okla. 229, 124 Pac. 972.

Pennsylvania. *Duroth Mfg. Co. v. Cauffiel*, 243 Pa. 24, 89 Atl. 798; *United States Circle Swing Co. v. Reynolds*, 224 Pa. 577, 73 Atl. 982; *New York & S. Const. Co. v. Winton*, 208 Pa. 467, 57 Atl. 955; *In re Hovey's Estate*, 198 Pa. 385, 48 Atl. 311; *Leasure v. Union Mut. Life Ins. Co.*, 91 Pa. St. 491; *Hall's Safe Co. v. Walenk*, 42 Pa. Super. Ct. 576; *National Cash Register Co. v. Shurber*, 41 Pa. Super. Ct. 187.

Rhode Island. *Garratt-Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187; 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948.

South Dakota. *Peck Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109.

Tennessee. *Turecott v. Yazoo & M. Val. R. Co.*, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067.

Texas. *Texas Land & Mortgage Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384; *Jackson Woolen Mills v. Moore*, — Tex. Civ. App. —, 154 S. W. 642; *Geiser Mfg. Co. v. Gray*, 59 Tex. Civ. App. 617, 126 S. W. 610; *Western Paper Bag Co. v. Johnson* (Tex. Civ. App.), 38 S. W. 364; *American Starch Co. v. Bateman* (Tex. Civ. App.), 22 S. W. 771; *Reed v. Walker*, 2 Tex. Civ. App. 92, 21 S. W. 687.

Utah. *George R. Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

Washington. *Lilly-Brackett Co. v. Sonnemann*, 50 Wash. 487, 97 Pac. 505.

West Virginia. *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 W. Va. 696, 26 L. R. A. (N. S.) 1101, 66 S. E. 1073.

Wisconsin. *American Food Products Co. v. American Milling Co.*, 151 Wis. 385, 138 N. W. 1123; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940; *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387.

in the state related to the policy does not constitute doing business

In *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, 91 N. E. 480, in holding that the bringing of a suit in the courts of the state by a foreign corporation was not in itself doing business or the exercise of one of the corporate powers of the corporation within the meaning of a statute providing that no foreign corporation shall be permitted or allowed to transact any business or exercise any of its corporate powers in the state until it has complied with certain prescribed statutory conditions, and also providing that in addition to a certain penalty, no suit can be maintained in any court of the state by a foreign corporation not having complied with the requirements of the statute, *Cooke, J.*, said: "The words 'doing business' and 'transacting business' as used in statutes regulating foreign corporations, have by numerous judicial decisions been given a settled and recognized meaning, and refer only to the transaction of the ordinary business in which the corporation is engaged, and do not include acts not constituting any part of its ordinary business, such as instituting and prosecuting actions in courts. * * * Is the meaning of this statute different by reason of the use of the words 'or exercise any of its corporate powers,' in connection with the prohibition against doing business in this state? In our opinion it is not. We think the words 'corporate powers,' as used in this act, refer to the franchises belonging to the corporation, or those powers which are specially conferred upon a corporation for the purpose of authorizing it to do or transact the particular business in which it intends to engage, together with those implied powers which are necessary to enable it to carry on that business, and do not

include the right to sue or any other of those powers incident to the existence of every corporation which arise from the mere act of incorporation, and do not depend for their existence upon the authority to transact or engage in any particular business. *Snell v. City of Chicago*, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858. We are impelled to this conclusion, first, by reason of the fact that the title of the act under consideration does not disclose any intention on the part of the legislature to limit the right of a foreign corporation to exercise its corporate powers in the state other than the corporate powers exercised in doing business in the state, and were the body of the act to be given a contrary construction, that portion which purports to regulate the exercise of the corporate powers not included in the term 'doing business,' would have to be rejected because not expressed in the title of the act (Const. art. 4, § 13, *Hogan v. Akin*, 181 Ill. 448, 55 N. E. 137); and second, because if it had been intended, by prohibiting a foreign corporation from exercising any of its corporate powers, to prohibit it from bringing suits in the courts of this state, it would have been entirely useless to provide as one of the penalties for doing business in the state without first complying with the statute, that permission to resort to the courts of this state should be withdrawn from the offending corporation, as is done by section 6 of the act."

The words "doing business" in a statute providing that "foreign corporations doing business in the state shall be subject to all the liabilities, restrictions and duties that may be imposed upon corporations of like character organized under the general laws of this state and shall have no

in the state.⁵² Nor does an action by a foreign corporation on notes taken by it in the state for goods sold by it in the state of its domicile.⁵³ Under a statute prohibiting a foreign corporation from transacting business in the state until it shall establish a public office or place in the state for the transaction of its business where legal service of process may be obtained upon it, and requiring every such corporation to file a copy of its charter and a certain statement and procure a certificate of compliance and authority to do business in the state, it is held that a foreign corporation which in the course of business in the state of its domicile has become the assignee or holder in trust of a claim against a citizen of the state has the right to come into the state and pursue every remedy and resort to every means that a citizen of the state might do to collect or secure the benefit of that claim.⁵⁴ The bringing of a suit in a state by the trustee for the creditors of a foreign mutual insurance company to recover assessments made upon policyholders by a decree of a court of the state under whose laws the corporation was created is not a transacting of business in the former state within the meaning of a statute prescribing certain conditions upon which foreign insurance companies may do business in the state.⁵⁵ The filing of a petition in intervention by a

other or greater powers," refer to the business for which the corporation was organized, and not a resort to courts of the state to enforce a contract liability, such as an action to recover the amount of a call upon its stock made in another jurisdiction. *Mandel v. Swan Land & Cattle Co., Ltd.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, rev'g 51 Ill. App. 204.

The coming into the state by the president of a foreign corporation for the purpose of compromising a claim against it for death by an alleged wrongful act on its part committed in the state of its creation does not constitute doing business by the corporation in the former state. *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889.

See, however, *Atkinson v. U. S. Operating Co.*, 129 Minn. 232, 152 N. W. 410.

⁵² *Tabor v. Goss & Phillips Mfg. Co.*,

11 Colo. 419, 18 Pac. 537.

⁵³ *Fuller & Johnson Mfg. Co. v. Foster*, 4 Dak. 329, 30 N. W. 166. See also *Tallapoosa Lumber Co. v. Holbert*, 5 N. Y. App. Div. 559, 39 N. Y. Supp. 432.

⁵⁴ *Meddis v. Kenney*, 176 Mo. 200, 98 Am. St. Rep. 496, 75 S. W. 633.

⁵⁵ *Swing v. Brister*, 87 Miss. 516, 6 Ann. Cas. 740, 40 So. 146, criticising dictum in *Cowan v. London Assur. Corporation*, 73 Miss. 321, 55 Am. St. Rep. 535, 19 So. 298, and saying: "The very proposition inadvertently thrown out as dictum * * * in the *Cowan* case, supra, that a foreign corporation which does not transact business of insurance within this state but which has issued a policy of fire insurance on property within this state, owned by a citizen resident here, cannot institute suit against that citizen policyholder for premiums, because the institution of such suit is the transacting of insurance business

foreign corporation in a suit pending in a state court does not constitute "doing business" in the state within the meaning of a statute prescribing certain conditions upon which a foreign corporation may do business within the state.⁵⁶ For a foreign corporation to take an appeal bond from a judgment obtained by it is not to "transact business" within the meaning of a statute prescribing certain conditions upon which a foreign corporation may do business in the state.⁵⁷ Under a statute requiring every foreign corporation to file a copy of its articles of incorporation and designate an agent for the service of process, and imposing a penalty for the violation thereof, and providing that in addition to such penalty on and after the going into effect of the act, no foreign corporation failing to comply with the statutory provisions "can maintain any suit or action, either legal or equitable, in any of the courts of the state upon any demand, whether arising out of contract or tort," it is held that a foreign corporation which has not done any business in the state in violation of the statute may invoke the aid of the courts of the state to enforce its legal rights, as the act of bringing and conducting the suit is not doing business in the state within the prohibition of the statute.⁵⁸

§ 5936. Appointing agents in state. Under a statute providing that agents of a foreign corporation, before entering upon their business as such, shall file evidences of their authority with the clerk of the county in which they propose to do business, it was said that the agents contemplated by the statutes are such agents as propose to transact "the business in which the corporation is engaged, and that it has no application to persons who are engaged in appointing agents to do its business. It may be necessary to appoint agents to do the business of a corporation, but appointing agents can hardly be said to be the business of any corporation in the sense of the statute."⁵⁹

within this state, within the meaning of our statutes, is expressly declared unsound in the following case: *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 55 Ark. 163, 18 S. W. 43, where the court said: 'Appellees notwithstanding they are foreign corporations, have a right to litigate in the courts of this state, without complying with the constitutional and statutory provisions which regulate their rights to do business here, because the institution and prosecution of a suit are not doing

business within the meaning of such provisions.' "

⁵⁶ *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667.

⁵⁷ *McCarthy v. Alphons Custodis Chimney Const. Co.*, 125 Ill. App. 119, aff'd 219 Ill. 616, 76 N. E. 850.

⁵⁸ *Havens & Geddes Co. v. Diamond*, 93 Ill. App. 557.

⁵⁹ *Morgan & Co. v. White*, 101 Ind. 413, quoted with approval in *First Nat. Bank v. Leeper*, 120 Mo. App. 688, 97 S. W. 636, and *Verdigris River*

Under a statute requiring foreign insurance companies to obtain a certificate from the state auditor as a prerequisite to doing business in the state, the transaction of the business of insurance is not constituted by the appointment of an agent by such foreign insurance company or the taking of a bond from such agent.⁶⁰ But where a foreign corporation had been prosecuting its business in the state and in connection therewith employed an agent whose fidelity it insured with a surety bond, the taking of such bond constituted a part of the business in which the corporation was engaged in the state.⁶¹ The mere presence of an agent within the state, authorized to transact particular business, not involving an exercise of the corporate powers or franchises and not a part of the business which the corporation was created and organized to transact, is not properly to be considered "doing business" within the meaning of such provisions.⁶²

§ 5937. Corporation conducting schools by correspondence. In the state courts it has been held that a foreign corporation organized for the purpose, among other things, of conducting schools by correspondence, which maintains a distributing office in the state, to which it ships textbooks in carload lots, which textbooks it thereafter sends out in single volumes by mail or express from such office to its students residing within a certain territory, is doing business in the state.⁶³ But such acts have been held by the Supreme Court of the

Land Co. v. Stanfield, 25 Okla. 265, 105 Pac. 337. This view is also stated in Hollowell v. Smith Agricultural Chemical Co., 41 Ind. App. 361, 83 N. E. 772; Watkins v. Donnell, 192 Mo. App. 640, 179 S. W. 980. See also Kibby v. Cubie, Heimann & Co., 41 Okla. 116, 137 Pac. 352.

⁶⁰ Wilson v. Ohio Farmers' Ins. Co., 164 Ind. 462, 73 N. E. 892.

⁶¹ Kelly Broom Co. v. Missouri Fidelity & Casualty Co., 195 Mo. App. 305, 191 S. W. 1128, distinguishing Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604, on the ground that in the latter case the corporation had not yet done business in the state and the contract related to future acts contemplated by it.

⁶² Bentlif v. London & C. Finance Corporation, Ltd., 44 Fed. 667; Clews v. Woodstock Iron Co., 44 Fed. 31; St.

Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., 32 Fed. 802; Carpenter v. Westinghouse Air-Brake Co., 32 Fed. 434; United States v. American Bell Tel. Co., 29 Fed. 17; Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; Beard v. Union & A. Pub. Co., 71 Ala. 60; Ferguson Contracting Co. v. Coal & Coke Ry. Co., 33 App. Cas. (D. C.) 159; Morgan & Co. v. White, 101 Ind. 413.

⁶³ Illinois. International Text-Book Co. v. Mueller, 149 Ill. App. 509.

Kansas. International Text-Book Co. v. Pigg, 76 Kan. 328, 91 Pac. 74, rev'd 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

Missouri. International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922.

New York. International Text-Book

United States to constitute interstate commerce, and to not render the foreign corporation liable to comply with the statutes of the state imposing restrictions upon the right of foreign corporations to do business therein.⁶⁴

§ 5938. Transactions involving insurance. A statute providing that foreign insurance corporations shall comply with certain conditions before they shall be entitled to do business in the state, and that such a company shall not enforce in the courts of the state any contract made by its agents, does not apply, as a rule, to a contract of insurance by a foreign corporation with a resident of the state and covering property therein, when the contract is made by the company in the state of its domicile by correspondence or otherwise; and it makes no difference that the premium, either in money or notes and the application for the insurance are received by an agent in the state, if no contract is there consummated, but they are forwarded to the company and acted upon, and a policy issued at its home office.⁶⁵ So

Co. v. Connelly, 67 Misc. 49, 124 N. Y. Supp. 603, aff'd 140 App. Div. 939, 125 N. Y. Supp. 1125.

Vermont. International Text-Book Co. v. Lynch, 81 Vt. 101, 69 Atl. 541.

Wisconsin. International Text-Book Co. v. Peterson, 133 Wis. 302, 14 Ann. Cas. 965, 113 N. W. 730.

"The details of soliciting pupils, imparting instruction, the delivery, bailment and return of books, would also come within the prohibition against transacting business in this state." International Text-Book Co. v. Peterson, 133 Wis. 302, 14 Ann. Cas. 965, 113 N. W. 730, quoted with approval in International Text-Book Co. v. Mueller, 149 Ill. App. 509.

See also § 5769, supra.

⁶⁴ International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, rev'g 76 Kan. 328, 91 Pac. 74. See § 5769, supra.

⁶⁵ **United States.** Hazletine v. Mississippi Val. Fire Ins. Co., 55 Fed. 743; Berry v. Knights Templars' & Masons' Life Indemnity Co., 46 Fed. 439; Marine Ins. Co. v. St. Louis, I. M. & S.

Ry. Co., 41 Fed. 643; Wall v. Equitable Life Assur. Society, 32 Fed. 273; Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. 225; Lamb v. Bowser, 7 Biss. 315, Fed. Cas. No. 8,008, aff'd 7 Biss. 372, Fed. Cas. No. 8,009.

Alabama. Jackson v. State, 50 Ala. 141.

Arkansas. State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 29 L. R. A. 712, 54 Am. St. Rep. 191, 31 S. W. 157; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

Illinois. Equitable Mut. Fire Ins. Co. v. McCrae, 156 Ill. App. 467.

Louisiana. State v. Williams, 46 La. Ann. 922, 15 So. 290; New Orleans v. Rhenish Westphalian Lloyds, 31 La. Ann. 781.

Michigan. Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

New Jersey. Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33.

New York. Stone v. Penn Yan, K. P. & B. Ry., 197 N. Y. 279, 134 Am. St. Rep. 879, 90 N. E. 843; Penn Collieries Co. v. McKeever, 183 N. Y. 98,

an insurance company is not doing business in a state other than that by which it was created, merely because it issues to a citizen of such state a policy of insurance, where the application for the policy is received in another state without solicitation in the former state and it executes and delivers the policy and receives the premium in the other state. In such case there cannot be said to be any "doing of business" in the former state by the foreign corporation that would subject it to taxation therein, and legislation imposing such a tax would be unconstitutional and void.⁶⁶ If a foreign insurance company unauthorized to do business in the state issues policies through a licensed broker, acting pursuant to a statute of the state authorizing the obtaining by such broker of policies issued by foreign insurance companies unauthorized to do business in the state, such foreign insurance company is not doing business in the state contrary to the statutes regulating the right of foreign insurance companies to do business in the state.⁶⁷ And where a contract of insurance was made in another state and the policies were issued in that state, it is no defense, in an action by the insurance company issuing such policies against a common carrier for negligence in respect to the property insured, that it had not complied with the laws of the state at the time of the issue of the policies.⁶⁸

While a state can prohibit a foreign insurance company from coming into the state to make a contract, it cannot forbid its citizens from lawfully making a contract with the company at its domicile and thereafter performing the contract through the mail.⁶⁹ Thus a statute

2 L. R. A. (N. S.) 127, 75 N. E. 935; Hyde v. Goodnow, 3 N. Y. 266; Huntley v. Merrill, 32 Barb. 626; People v. Imlay, 20 Barb. 68.

Oregon. Hacheny v. Leary, 12 Ore. 40, 7 Pac. 329.

Wisconsin. Seamans v. Knapp-Stout & Co., 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825, 61 N. W. 757.

See § 5776, *supra*.

A statute prohibiting foreign insurance companies from doing business in the state until they have secured a specified amount of capital does not invalidate a guaranty note given in the state to a foreign corporation, which had not been authorized to do business, for the security of the holders of policies lawfully issued outside

of the state. Hope Mut. Life Ins. Co. v. Perkins, 38 N. Y. 404, 2 Abb. Dec. 383.

For acts of a fraternal benefit corporation held not to be the "doing of business" in the state, see Grand Lodge, A. O. U. W., of Connecticut v. Grand Lodge, A. O. U. W., of Massachusetts, 81 Conn. 189, 70 Atl. 617.

⁶⁶ State v. Connecticut Mut. Life Ins. Co., 106 Tenn. 282, 61 S. W. 75, citing Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832.

⁶⁷ Equitable Mut. Fire Ins. Co. v. McCrae, 156 Ill. App. 467.

⁶⁸ Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 643.

⁶⁹ Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832.

providing that any person who shall fill up, sign or issue in the state any certificate of insurance, under an open marine policy, or who in any manner whatever does any act in the state to effect for himself, or for another, insurance on property then in such state, in any marine insurance company which has not complied in all respects with the laws of the state, shall be subject to a fine, is unconstitutional, when construed to prevent the owner of cotton in such state from sending through the mails a letter to a foreign insurance company which had not complied with the laws of the state ordering a policy of insurance on cotton to be shipped to a foreign country, when such letter is written pursuant to a valid contract made outside the state.⁷⁰ But the

⁷⁰ *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832. Mr. Justice Peckham said: "Has not a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of *Hooper v. California*, 155 U. S. 648 (39 L. Ed. 297), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it pro-

hibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution. In the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter or notification, even though the property which is the subject of the insurance

fact that a contract of insurance by a foreign insurance company on property in the state was made outside the state does not necessarily make it enforceable in the state; for the state is not bound to enforce contracts made out of the state, although they may be valid where made; if their enforcement is contrary to its laws or public policy. Some of the courts, therefore, have refused to enforce contracts of insurance made by a foreign insurance company on property in the state, where the company has failed to comply with the statute prescribing conditions precedent to the right to do business therein, although the contracts were made outside the state, and were valid where they were made.⁷¹ However, if the contract of insurance was made within

may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. * * * The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state. * * * In such a case as the facts here present the policy of the state in forbidding insurance companies which had not complied with the laws of the

state from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the state of Louisiana, when it was written pursuant to a valid contract made outside the state and with reference to a company which is not doing business within its limits."

⁷¹ *Swing v. Munson*, 191 Pa. St. 582, 58 L. R. A. 223, 71 Am. St. Rep. 772, 43 Atl. 342; *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 27 L. R. A. 556, 46 Am. St. Rep. 855, 62 N. W. 526.

In *People's Building, Loan & Saving Ass'n v. Berlin*, 201 Pa. 1, 88 Am. St. Rep. 764, 50 Atl. 308, it was said: "Insurance cases stand upon a basis of their own. The business of insurance has been held not to be commerce, as an insurance policy has been defined merely as a contract of indemnity, and for this reason not protected as interstate commerce."

In *State v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406, it was said: "Respondents cite and rely on that line of decisions wherein foreign banking or insurance corporations have been held not entitled to recover on contracts made with citizens of the state where the action was brought, because the corporation had not complied with the conditions imposed on such corporations in that state. * * *

the state, it is considered as doing business in the state.⁷² Thus where it appears that a foreign accident corporation is actively soliciting membership in the state, and is annually receiving a large sum of money from the citizens of the state in the form of assessments to aid it in carrying out its contracts in the state and elsewhere, it will not be heard to say that it is not doing business in the state.⁷³ A foreign insurance company which has outstanding policies of insurance in the state on which it collects dues and on which it makes adjustments in case of loss will be deemed to be still doing business in the state so that it may be brought into court by service on one of its agents, although it may have ceased to solicit new business.⁷⁴ But where a statute provided that foreign insurance corporations doing business in the state should pay a privilege tax on their gross premium

Those cases have no application to this case. By reason of the peculiar nature of some lines of business, such as banking and insurance, the legislatures of many states have imposed special restrictions upon the manner in which the business of such corporations shall be conducted. The object of such laws is usually to protect the citizens of the state from irresponsible companies or improvident contracts, and often to subject the business to taxation or to protect its own citizens or domestic corporations from the disadvantages which would result to them if foreign corporations could do business in the state on less onerous terms than are imposed on domestic corporations of like character. We had occasion in *Walker v. Rein* (recently decided), 14 N. D. 608, 106 N. W. 405, to apply the principles enunciated by this line of cases. The courts will not recognize the validity of any contract made by a foreign corporation with a resident of this state or affecting property here, whether made in or out of the state, if the contract is one which domestic corporations generally are forbidden to make in this state, or if the contract is one which it is contrary to public policy to enforce. A contract of insurance upon property in this state, or upon

the life of a resident thereof, without complying with the conditions imposed by our laws, is an evasion of the laws which the courts will not tolerate even if the contract were technically entered into beyond our borders. This is so, not because the corporation is a foreign one, but because it is the policy of the law to prohibit such contracts from being made with our citizens, or with respect to property in the state, without compliance with the conditions imposed by the statute."

⁷² *Massachusetts. Roche v. Ladd*, 1 Allen 436.

Missouri. Lukens v. International Life Ins. Co., 269 Mo. 574, 191 S. W. 418; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 53 L. R. A. 305, 71 Am. St. Rep. 628, 50 S. W. 519.

New Hampshire. Perry v. Dwelling House Ins. Co., 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731.

Oregon. Hacheny v. Leary, 12 Ore. 40, 7 Pac. 329.

Wisconsin. Rose v. Kimberly & Clark Co., 89 Wis. 545, 27 L. R. A. 556, 46 Am. St. Rep. 855, '62 N. W. 526.

⁷³ *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529.

⁷⁴ *Johnston v. Mutual Reserve Fund Life Ins. Co.*, 43 N. Y. Misc. 251, 87 N. Y. Supp. 438. See § 6046, *infra*.

receipts, it was held that a foreign insurance company which had prosecuted its business of life insurance in the state through resident agents and local and general agencies, but which had withdrawn from the state, so far as soliciting or attempting to do any new business was concerned, leaving, however, a large number of policies in force, was not doing business in the state and, therefore, not liable to the tax, where the only business it did was to receive premiums on its existing policies by mail or express directly from the policyholders, such premiums being sent to the insurance company's agents or agencies outside the state, and not paid to the company in the state, and the policies provided that the premiums should be paid at the domicile of the corporation.⁷⁵ The fact that the contract of insurance provided that it shall be deemed and construed as a contract of the state of the corporation's domicile is immaterial on this question.⁷⁶ A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business by the insertion of a clause in its policies that the contract shall be governed and construed by the laws of the state by which it was incorporated.⁷⁷

§ 5939. Miscellaneous acts held to be doing business in the state.

A corporation may be deemed to be doing business in the state where it has come into the state over the road of a corporation chartered by the state, and the two corporations have formed an alliance for traffic or other purposes,⁷⁸ or where it engages in the business of oper-

⁷⁵ *State v. Connecticut Mut. Life Ins. Co.*, 106 Tenn. 282, 61 S. W. 75. The Supreme Court of Tennessee said: "The term, or phrase, 'doing business' does not have, and cannot have, a uniform and unvarying meaning, but is governed largely by the connection, and in view of the object of the statute, and these statutes are governed largely by the objects intended to be effected by them. We may admit that the receipt of premiums is doing business; but, when such collection is made in a foreign state, it does not amount to doing business in Tennessee, but in such foreign state. When the premium is paid and the renewal made and completed in a foreign state, we are unable to see how any business is done in Tennessee. Neither the policy is

renewed or continued, nor is the money paid in Tennessee, but both are in a foreign state. There is nothing done in Tennessee, no new business done or solicited; no agent there and no agency, no contract made, no money paid, no receipt for renewal given, and no business done of any character. The postal and express authorities are not the agents of the company, but of the insured, as the company's policies stipulate that the premiums shall be paid at the home or foreign office."

⁷⁶ *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 53 L. R. A. 305, 71 Am. St. Rep. 628, 50 S. W. 519.

⁷⁷ *Wall v. Equitable Life Assur. Society*, 32 Fed. 273; *Fletcher v. New York Life Ins. Co.*, 13 Fed. 526.

⁷⁸ *Buie v. Chicago, R. I. & P. R. Co.*,

ating floating elevators and hiring them for rent in the waters of the state,⁷⁹ or where it is engaged in the business of mining, smelting and refining ores in the state,⁸⁰ or where it enters into a contract to deliver and store ice at a particular place in the state, without reference to the source of supply or manufacture,⁸¹ or where it sells shrubbery and trees to a resident of the state and agrees to plant them on the premises of the purchaser,⁸² or where it is engaged in the business of manufacturing and selling vehicles in another state, and delivers vehicles to a resident of the state under an agreement whereby he is to house and take care of them without charge and sell them at retail at any price he sees fit over a specified price, the excess belonging to him as his commission and profit, the title to be retained by the foreign corporation and the vehicles to be insured at the expense of such person for the benefit of the corporation, and the corporation employs a traveling salesman to assist in selling the vehicles.⁸³ A foreign corpora-

95 Tex. 51, 55 L. R. A. 861, 65 S. W. 27.

⁷⁹ *People v. Roberts*, 116 N. Y. App. Div. 30, 101 N. Y. Supp. 184.

⁸⁰ *American Smelting & Refining Co. v. People*, 34 Colo. 240, 82 Pac. 531, rev'd on other grounds 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978.

⁸¹ *West Jersey Ice Mfg. Co. v. Armour*, 12 Pa. Super. Ct. 443.

⁸² *Phoenix Nursery Co. v. Trostel*, 166 Wis. 215, 164 N. W. 995.

⁸³ *Wilson-Moline Buggy Co. v. Priebe*, 123 Mo. App. 521, 100 S. W. 558. The court said: "The right of corporations created under the laws of other states to send its itinerant salesmen into this state to solicit and transact business without complying with the provisions of the laws under consideration is expressly recognized in section 1025, supra, and this exception indicates a legislative purpose not to interfere with the free conduct of interstate commerce, but only to require those foreign corporations which seek to establish and maintain some part of their enterprise within the state, and which therefore expect to avail themselves of the benefit and protection of its laws and the use of

its courts, to submit themselves to the burdens imposed by its laws on domestic corporations of like character. Therefore, in the use of the term 'to transact business in this state,' reference plainly is had to business operations of the corporation carried on within this state through the medium of agents established therein, and which are continuous or of some duration, and not to the operations of traveling salesmen, or to isolated or casual business transactions. In *Blevins v. Fairley*, 71 Mo. App. 259, we held 'that the act applied only to those corporations which established themselves here as resident foreign corporations and transacted business, and did not apply to foreign corporations not established or resident in this state.' This construction of the statute is supported by the decisions in this state. * * * If it was a 'resident foreign corporation' within the definition we have given to that term, the action must fail. If it was not, then its failure to comply with the statutory provisions relating to foreign corporations is without effect on its right to maintain the action. Should it be said that the relation

tion conducting a ferry is doing business in a state where it has leased a ship or wharf at which its boats touch for the reception and disembarking of passengers and freight, although it does nothing else within the state,⁸⁴ but such corporation is within the protection of the commerce clause of the Federal Constitution, if it is engaged in interstate commerce, and need not comply with the provisions of a statute imposing upon foreign corporations doing business in the state the performance of conditions precedent to the right to do business therein.⁸⁵ A foreign corporation which supplies performers for a Chautauqua course and manages entertainments held in the state, its agent selling tickets and collecting the proceeds for admission, and which advertises that the Chautauqua is to be a permanent business is doing business in the state within the meaning of a statute imposing restrictions upon the doing of business in the state by foreign corporations.⁸⁶ So also is a foreign corporation engaging in booking theatrical companies with theaters in the state as agent for the owners of such theaters.⁸⁷ Where a foreign corporation made an offer to a person in a state where it had a stock of goods to sell him such goods and the good-will of a branch of such corporation, the acceptance of such offer by mail or telegraph completed the contract notwithstanding a note given in part payment of the purchase price was sent by the purchaser from the state to the home office of the corporation, and the note in question was part of business transacted within the state.⁸⁸

between plaintiff and the McFarland Carriage Company, and later that between plaintiff and defendant, was that of principal and agent, then it is quite clear that plaintiff engaged in business in the state of Missouri with a resident agent in charge. It brought its goods into this state to be sold in the general market, and the transactions cannot be regarded as isolated or casual, but must be considered as the indubitable manifestation of a purpose on the part of the plaintiff to maintain a local mart for the disposal of its product, and consequently they became an integral part of the very enterprise."

See also *United States Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. 398; *D. M. Osborne & Co. v. Shilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258; *Com. v. Parlin & Orendorff Co.*,

118 Ky. 168, 80 S. W. 791. But see *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1.

⁸⁴ *Com. v. Gloucester Ferry Co.*, 98 Pa. St. 105, rev'd 114 U. S. 196, 29 L. Ed. 158.

⁸⁵ *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158. See also *Savage v. Atlanta Home Ins. Co.*, 55 N. Y. App. Div. 20, 66 N. Y. Supp. 1105.

See, as to acts of foreign steamship company in state as doing business in state so as to justify service of process upon it, *Frontier S. S. Co. v. Franklin S. S. Co.*, 233 Fed. 127.

⁸⁶ *Wichita Film & Supply Co. v. Yale*, 194 Mo. App. 60, 184 S. W. 119.

⁸⁷ *Interstate Amusement Co. v. Albert*, 128 Tenn. 417, 161 S. W. 488.

⁸⁸ *Hirschfeld v. McCullach*, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1131. The

§ 5940. Miscellaneous acts held not to constitute "doing business." Among the contracts and other transactions of foreign corporations which have been held not to constitute the doing of business within a state, within the meaning of a statute prohibiting foreign corporations from doing business in the state except upon compliance with certain conditions, or imposing a tax or license fee upon such corporations, the following may be mentioned: The purchasing by a foreign trust company of securities of a railway company in the state, and taking a mortgage on its property as security;⁸⁹ the purchase by a foreign corporation outside of the state of a negotiable note secured by a trust deed on land situated in the state,⁹⁰ or of negotiable state warrants;⁹¹ the purchase of a promissory note or a mortgage in a state with no intention of doing any other act there;⁹² the

court said: "The principal question to be determined is whether or not the contract of which the note constituted a part was made in the state of Oregon or in the state of Illinois, or, in other words, whether the note in question was part of business transacted within the state of Oregon or not. The offer to sell the stock and good will had no effect until it reached the defendant in Portland, Ore., where it was addressed to him and where he and the goods were at the time. On the other hand, when acceptance of the same was intrusted to the telegraph company or to the mails, this completed the contract, and it became binding from the moment it was so promulgated. *Williams v. Burdick*, 125 Pac. 844; *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Busher v. N. Y. Life Insurance Co.*, 72 N. H. 551, 58 Atl. 41; *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004; *Burton v. U. S.*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362. * * * In the light of the authorities noted above, it is our judgment that the incidents delineated in the testimony culminating in the giving of this note constituted the transaction of business within the state of Oregon by the corporation named, and as such is within the inhibition

of the statute of this state relating to foreign corporations. Although the acceptance of the offer of the corporation to sell and giving the note in part payment of the purchase price of the property were the last acts of a two years' course of business transacted in the state, yet they are none the less obnoxious to the statute than the first or any other act of that course."

⁸⁹ *Gilchrist v. Helena, H. S. & R. Co.*, 47 Fed. 593.

⁹⁰ *Kephart v. People*, 28 Colo. 73, 62 Pac. 946; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740.

⁹¹ *Kephart v. People*, 28 Colo. 73, 62 Pac. 946.

⁹² *Commercial Bank of Vancouver v. Sherman*, 28 Ore. 573, 52 Am. St. Rep. 811, 43 Pac. 658; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 680.

In *Commercial Bank of Vancouver v. Sherman*, 28 Ore. 573, 52 Am. St. Rep. 811, 43 Pac. 658, the court in holding that a foreign banking corporation purchasing a promissory note in a state and with no purpose of doing any other act in the state, was not "transacting business" in the state, within the meaning of a statute providing that a foreign banking corporation "before transacting business" in the state must record a power of

taking by a foreign corporation of a mortgage or other security to secure a pre-existing debt, or to secure a debt contracted in another state; ⁹³ receiving a note in compromise of a claim against a resident

attorney in the clerk's office of each county where it has a resident agent, which power of attorney shall be irrevocable, so long as such company shall have places of business in the state, said: "The single inquiry presented by this record, therefore, is whether a foreign banking corporation purchasing a promissory note in this state, and with no purpose of doing any other act here, is 'transacting business' in the state, within the meaning of the statute. It seems to us this question must be answered in the negative. In our opinion, the statute, when reasonably construed, was intended to prohibit certain foreign corporations coming into this state for the purpose of transacting their ordinary corporate business without first appointing some resident agent, upon whom service of summons could be had in case of litigation between them and citizens of the state, and was not designed or intended to prohibit the doing of a single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business here. It will be noticed that the statute does not require the power of attorney to be recorded before 'doing any business,' but 'before transacting business,' and that it shall be filed in every county where the corporation has 'a resident agent,' and shall be irrevocable except by the substitution of another qualified person for the one named therein so long as the corporation shall have 'places of business' in the state. These provisions would seem necessarily to indicate that the statute was intended to apply to a corporation whose actual or contemplated business in the state is such as

to admit of its having resident agents or places of business therein; and, to have a resident agent or place of business, it must be carrying on, or intending to carry on, its ordinary corporate business; for a corporation doing but a single act of business, with no intention of doing more, could not, in the nature of things, be expected to have a resident agent or place of business. To require a foreign banking corporation to execute and file the power of attorney required by the statute as a prerequisite to its right to purchase a promissory note, or take a mortgage to secure a debt, or to do any other single act of business, when there was no purpose or intention to engage in banking here, would be a very narrow, harsh, and, * * * an unwarranted, construction of the statute."

93 United States. *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 7 Ann. Cas. 219. See *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412.

Alabama. *Covey Cotton Oil Co. v. Bank of Ft. Gaines*, 15 Ala. App. 529, 74 So. 87, certiorari denied 75 So. 1003. See *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84.

Arkansas. *Florsheim Bros. Dry-Goods Co. v. Lester*, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162, 29 S. W. 34.

Kentucky. *Ichenhauser Co. v. Landrum's Assignee*, 153 Ky. 316, 155 S. W. 738.

Pennsylvania. *People's Building, Loan & Savings Ass'n v. Berlin*, 201 Pa. 1, 88 Am. St. Rep. 764, 50 Atl. 308.

Wisconsin. See *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387.

of the state;⁹⁴ the making by a foreign corporation within the state of a contract adjusting a judgment debt arising out of business transacted outside of the state;⁹⁵ the execution and mailing of a letter of credit to a foreign corporation;⁹⁶ the payment of debts by the foreign corporation to persons within the state;⁹⁷ a settlement of accounts for goods sold by the corporation in the state of its domicile, and sent into the state where the settlement is made;⁹⁸ the taking of assignments of claims against citizens of the state and bringing suit thereon;⁹⁹ a provision in the mortgage bonds of a foreign street railway corporation that the principal thereof and the coupons attached thereto shall be payable in a certain city of the state;¹ a single sale of real estate by a foreign religious corporation;² dealings by a foreign corporation with citizens of other states in reference to property situated without the state, although the parties meet and draw up the contract within the state;³ the making of a contract out of the state by which title to a tract of land within the state is acquired by a foreign corporation;⁴ contracting outside of the state with one also living outside to purchase timber situated in the state, in contemplation of subsequently doing business in the state;⁵ the entering by a foreign corporation into a contract with its stockholders, who are citizens of the state, by which they are to can fruit and hold it subject to the order of the corporation which was the agent of all its members in making the sale of their commodities;⁶ the interstate trans-

⁹⁴ *Holman v. Durham Buggy Co.*, — Ala. —, 76 So. 914; *Creteau v. Foote & Thorne Glass Co.*, 40 N. Y. App. Div. 215, 57 N. Y. Supp. 1103.

⁹⁵ *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22, rev'g *Delaware Ins. Co. v. Security Co.* (Tex. Civ. App.), 54 S. W. 916. See *Atkinson v. United States Operating Co.*, 129 Minn. 232, L. R. A. 1916 E 241, 152 N. W. 210.

⁹⁶ *Tyler v. Consolidated Portrait Frame Co.*, — Tex. Civ. App. —, 191 S. W. 710.

⁹⁷ *Tidey v. Kent Circuit Judge*, 179 Mich. 580, 146 N. W. 224.

As to the validity of a chattel mortgage given by a foreign corporation doing business in the state without having complied with the laws governing the admission of foreign corporations, see *Goldberg v. Parker*, —

Mich. —, 164 N. E. 396.

⁹⁸ *New Jersey Steel Tube Co. v. Riehl*, 9 Pa. Super. Ct. 220. See also *Dempster Mill Mfg. Co. v. Humphries*, — Tex. Civ. App. —, 202 S. W. 981.

⁹⁹ *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g on rehearing 28 Utah 372, 79 Pac. 570.

¹ *Toledo Railways & Light Co. v. Hill*, 244 U. S. 49, 61 L. Ed. 982.

² *General Conference of Free Baptists v. Berkey*, 156 Cal. 466, 105 Pac. 411.

³ *Hart v. Livermore Foundry & Machine Co.*, 72 Miss. 809, 17 So. 769.

⁴ *Goldsberry v. Carter*, 100 Va. 438, 41 S. E. 858.

⁵ *Philip A. Ryan Lumber Co. v. Ball*, — Tex. Civ. App. —, 177 S. W. 226.

⁶ *Kilgore v. Smith*, 122 Pa. St. 48, 15 Atl. 698, in which case it was said:

poration of merchandise by a foreign steamship company;⁷ the making of a contract within the state, no sales being made or other business transacted there;⁸ the purchase by a foreign corporation of stock in a domestic corporation;⁹ or merely owning stock in a domestic corporation, even though such ownership gives the corporation the controlling interest in the stock of the domestic corporation;¹⁰ the soliciting by a foreign corporation of subscriptions¹¹ to its capital

“It has never been held that a citizen of Pennsylvania may not be a member or a stockholder in a corporation of another state, or that a contract between such member and his corporation is ultra vires, because the latter has not complied with the provisions of the act of assembly. Nor do we think it material that an occasional meeting of the directors was held at Delta, a town partly in Maryland and partly in this state. Their acts are not necessarily void for such reason. 1 Mor. Priv. Corp. § 533. One of the objects of this act of assembly was to bring corporations employing their capital in this state, and doing business here, within the taxing power of the commonwealth. It does not appear that this corporation brought any of its capital into this state. Its place of business was in Maryland.”

⁷ Philadelphia & G. S. S. Co. v. Peechin, 61 Pa. Super. Ct. 401; Hayman v. Monongahela Consol. Coal & Coke Co., 81 W. Va. 144, 94 S. E. 36.
⁸ Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 41 N. Y. Misc. 242, 84 N. Y. Supp. 38, aff'd 87 N. Y. App. Div. 633, 84 N. Y. Supp. 1121.

The mere signing of a contract in the state by a foreign corporation does not constitute doing business in the state in violation of a statute relative to foreign corporations doing business in the state. Journal Printing Co. v. Inter-Ocean Newspaper Co., 167 Ill. App. 274; Briggs v. General Colonial Co., Inc., 168 N. Y. Supp. 74.

⁹ Toledo Traction, Light & Power

Co. v. Smith, 205 Fed. 643; Colonial Trust Co. v. Montello Brick Works, 172 Fed. 310; People v. American Bell Tel. Co., 117 N. Y. 241, 22 N. E. 1057; Com. v. Standard Oil Co., 101 Pa. St. 119. See also In re Green's Estate, 102 N. Y. Misc. 45, 168 N. Y. Supp. 364.

¹⁰ Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 51 L. Ed. 841; Toledo Traction, Light & Power Co. v. Smith, 205 Fed. 643; Mannington v. Hocking Valley Ry. Co., 183 Fed. 133. See also Com. v. Wilkes-Barre & H. R. Co., 251 Pa. 6, 95 Atl. 915. See, however, Central Life Securities Co. v. Smith, 236 Fed. 170, holding that the holding of stock of a domestic corporation by a foreign corporation constitutes doing business in the state by the foreign corporation.

¹¹ United States. Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864.

California. See General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 Pac. 411.

Kansas. Bartlett v. Chouteau Ins. Co., 18 Kan. 369.

Missouri. M. A. Kelly Broom Co. v. Missouri Fidelity & Casualty Co., 195 Mo. App. 305, 191 S. W. 1128.

Pennsylvania. Philadelphia & Gulf S. S. Co. v. Clark, 50 Pa. Super. Ct. 415; Galena Mining & Smelting Co. v. Frazier, 20 Pa. Super. Ct. 394; Wildwood Pavilion Co. v. Hamilton, 15 Pa. Super. Ct. 389.

In Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864, Drummond, J., said: “Conceding that a state would have the power to prevent any of its

stock; the sales of its shares of stock;¹² (though a contrary view is entertained in Alabama where it is held that the sale of stock is

citizens from subscribing within its own limits to the stock of a corporation of another state, it would require a clear and explicit declaration that such a subscription would be null and void except upon compliance with certain terms. This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscriptions to its stock. The ordinary business, for instance, done by the corporation in question here, was an insurance business. The obtaining of subscriptions was an act preliminary to the commencement of its business. When the subscriptions were obtained, and the corporation was set in motion and was made to perform its functions, then the ordinary business referred to by this act began—the issuing of policies of insurance and performing the general and other business connected with such corporations. I do not think that it is a fair or reasonable construction of the language of this law that it intended to prohibit such an act as this. It does not appear, in point of fact, by this special defense which I am now considering, that the corporation was doing any of its ordinary business. The language, I think, therefore, of this sixth section, intended to exclude any such agreement as was made by the defendant in this case, when it declared that it was not to apply to persons acting as agents for a special and temporary purpose, or for purposes not within the ordinary business of such corporation.”

¹² *Denman v. Kaplan*, — Tex. Civ. App. —, 205 S. W. 739. See also *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Brown v. Guarantee Savings, Loan & Investment Co.*, 46 Tex. Civ. App. 295, 102 S. W. 138.

First Nat. Bank v. Leeper, 121 Mo.

App. 688, 97 S. W. 636, citing *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864, the court said: “The business of the corporation here involved was that of a telegraph and telephone company. That is a well known business, and the prosecution of such business does not consist in selling some of its stock to an individual. Such transaction or such transactions, it is true may occur, but they are not the usual, or customary, or ordinary business of a telegraph or telephone company, nor is such corporation organized for the transaction of such business.”

A foreign corporation engaged in operating a mine in another country, which borrows money in the state and issues in the state shares of stock to a nonresident of the state, is not doing any business in the state within the meaning of a statute making the directors of a foreign corporation liable for its debts if it does “any business” in the state without complying with conditions precedent to its right to do business therein, notwithstanding the letterheads of the treasurer stated that the main office of the corporation was in the state. *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112.

A contract by which a foreign corporation agreed to exchange a certain number of its shares of stock for advertising in a local newspaper, the purpose of the advertising being to sell treasury stock of the corporation to raise money for the development of its properties, does not constitute doing business in the state. *Clark v. Kansas Petroleum Co.*, 144 Mo. App. 182, 129 S. W. 466. *Johnson, J.*, said: “The case falls squarely within the rule applied by this court in *Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636, where, after reviewing the author-

the exercise of a corporate function within the meaning of a constitutional and statutory prohibition against a foreign corporation engaging in or transacting business in the state before complying with certain conditions,¹³ and a sale of the stock of a foreign corporation made in the state by an agent of the corporation is engaging in or transacting business in the state within the meaning of a statute prohibiting a corporation not complying with certain statutory requirements from engaging in or transacting business in the state and making it unlawful for it and its agents so to do¹⁴); the soliciting and receiving of subscriptions to a newspaper or periodical published by it in another state;¹⁵ or soliciting advertisements to be published therein;¹⁶ the licensing by a foreign corporation of its telephones to a domestic corporation, receiving a stipulated sum per month for each machine used.¹⁷ The making by a foreign corporation of a collateral trust mortgage to a domestic trust company to secure an issue of bonds, and an underwriting agreement to sell part of the bonds, the procuring by the agent in the underwriting agreement of the defendant's signature to the underwriting agreement, the receipt of moneys from the defendant on his contract, the delivery to him of the bonds he thus paid for, and the assignment of the underwriting agreement to another to secure a note given to it by the foreign corporation, do not constitute doing business in the state within the meaning of a statute requiring foreign corporations to procure a

ities, we held that a contract made in this state by a corporation for the sale of its capital stock was not a part of the business the corporation was organized to conduct. Speaking through Ellison, J., we said: 'Such a transaction or such transactions, it is true, may occur, but they are not the usual or customary or ordinary business of a telegraph or telephone company (or business company), nor is such a corporation organized for the transaction of such business.' "

See also *Kelly Broom Co. v. Missouri Fidelity & Casualty Co.*, 195 Mo. App. 305, 191 S. W. 1128; *Southworth v. Morgan*, 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, aff'd 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196.

¹³ *Jones v. Martin*, — Ala. App. —, 74 So. 761. See also *Com. v. Wilkes-Barre & H. R. Co.*, 251 Pa. 6, 95 Atl.

915. And see *Ulmer v. First Nat. Bank*, 61 Fla. 460, 55 So. 405, 408, holding that under Florida Laws 1907, c. 5717, §§ 1, 4, a note given for the purchase price of stock of a foreign corporation sold in the state to a purchaser is void.

¹⁴ *Jones v. Martin*, — Ala. App. —, 74 So. 761.

¹⁵ *Beard v. Union & A. Pub. Co.*, 71 Ala. 60; *Crocker v. Muller*, 40 N. Y. Misc. 685, 83 N. Y. Supp. 189.

¹⁶ *Boardman v. S. S. McClure Co.*, 123 Fed. 614; *American Contractor Pub. Co. v. Bagge*, 91 N. Y. Supp. 73. See also *Bell Tel. Co. v. Galen Hall Co.*, 77 N. J. L. 253, 72 Atl. 47; *System Co. v. Advertisers' Cyclopedica Co.*, 121 N. Y. Supp. 611.

¹⁷ *United States v. American Bell Tel. Co.*, 29 Fed. 17.

certificate of compliance with the laws of the state before doing business therein.¹⁸ Where a foreign corporation agrees with a resident of the state to furnish a transcript of the testimony at a hearing before the Federal Interstate Commerce Commission, and performs the work in another state and sends it to the party in the state, it is not engaged in transacting business in the state.¹⁹ A foreign corporation need not comply with a statute requiring foreign corporations before doing business in the state to file in a designated office a copy of its charter where the business done by it in the state was that of another corporation which had duly complied with such statute, and for which the first mentioned corporation acted as agent.²⁰

XV. NONCOMPLIANCE BY FOREIGN CORPORATIONS WITH STATUTES

§ 5941. In general. There is much conflict in the different jurisdictions as to the effect of failure upon the part of a foreign corporation to comply with a statute imposing conditions upon its right to do business in the state, and it is impossible to reconcile the cases. Of course the question depends primarily upon the terms of the particular statute, and the intention of the legislature; but even when statutes have been substantially the same, the courts have not agreed in construing them.²¹

¹⁸ *Union Trust Co. of Rochester v. Sickels*, 125 N. Y. App. Div. 105, 109 N. Y. Supp. 262, Robson, J., said: "All of these facts relate only to and are a part of an apparently legitimate effort on the part of the telephone company to dispose of its bonds; that is, in other words, to borrow money. What the expression 'doing business,' or to 'do business,' within this state, as used in the statute, really means, has received judicial attention in many cases; but, except in the present case, it does not seem to have been yet held that a foreign corporation was doing business in this state, within the meaning of the statute, when it had done no business therein beyond presenting for sale and selling to individual purchasers, or floating on the market, either its stock or its bonds. *Payson v. Withers*, 19 Fed. Cas. 29, 30 (No. 10,864). The plain reading of the

statute shows that it was intended to prevent a foreign stock corporation from doing in this state the business for the doing of which it was organized until it had procured the required certificate, and that it does not contemplate a prohibition either of the sale of its stock or borrowing money on its obligations. It obviously relates only to the regular and customary business operations of the corporation."

¹⁹ *Law Reporting Co. v. Texas Grain & Elevator Co.*, — Tex. Civ. App. —, 168 S. W. 1001.

²⁰ *General Wilmington Coal Co. v. Finance Co. of Pennsylvania*, 125 Ill. App. 89.

²¹ *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 7 Ann. Cas. 219; *Model Heating Co. v. Magarity*, 1 Boyce (Del.) 240, 75 Atl. 614; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138,

In order to consider logically the effect of noncompliance by for-

54 N. W. 544; *Garrett-Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948.

In *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, the court said: "The statutes, too, present great variety. Some, like ours, are prohibitory in form, with no penalty attached, and silent as to the consequences of noncompliance. Others, while not prohibitory in form, attach a penalty for doing or failing to do certain specified things. Others have both the prohibitory form and the penalty. Some declare contracts made without compliance with their provisions void and unenforceable or unlawful. Others specify various consequences that shall follow noncompliance. One class of cases, where the statutes are prohibitory, with penalty attached, holds that contracts made without compliance with the terms of the statute are nevertheless valid and enforceable, on the ground that by annexing a penalty the legislature manifested its purpose that the penalty should be exclusive of all other consequences of noncompliance. Another class of cases, under similar statutes, holds that the annexation of a penalty renders all acts which subject the party to the penalty unlawful, and hence unenforceable, on the universally accepted proposition that no cause of action can be based upon an unlawful transaction. See *Buxton v. Hamblen*, 32 Me. 448; *Miller v. Post*, 1 Allen (Mass.) 434; *Wheeler v. Russell*, 17 Mass. 257; *Johnson v. Hulings*, 103 Pa. St. 498; *Holt v. Green*, 73 Pa. St. 198; *Dudley v. Collier* (Ala.), 6 South. Rep. 304; *Insurance Co. v. Harvey*, 11 Wis. 412; *Elkins v. Parkhurst*, 17 Vt. 105. But there is still another class of cases, where the statute annexes a penalty, that holds that contracts made without compliance

with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business but to accomplish some collateral object. In this class we cite *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655; *De Mers v. Daniels*, 39 Minn. 158, 39 N. W. Rep. 98; *Strong v. Darling*, 9 Ohio 201; *Pangborn v. Westlake*, 36 Iowa 546; *Rahter v. Bank*, 92 Pa. St. 393. It has been held under statutes, prohibitory in form, but without penalty, and silent as to the consequences, such as ours heretofore quoted, that all contracts entered into without compliance with the terms of the statute were absolutely void. These cases are based largely upon the thought that, inasmuch as there is no penalty or forfeiture provided in the statute for a disregard of its terms, there remains no method of its enforcement, other than to declare all contracts made in disregard of the statutory provisions unenforceable. *Bank v. Page*, 6 Ore. 431; *Hacheny v. Leary*, 12 Ore. 40, 7 Pac. Rep. 329; *In re Comstock*, 3 Sawy. 218; *Hoffman v. Banks*, 41 Ind. 1; *Insurance Co. v. Harrah*, 47 Ind. 236; *Insurance Co. v. Thomas*, 46 Ind. 44; *Assurance Co. v. Rosenthal*, 55 Ill. 85. Other cases arising, like those last noticed, under statutes prohibitory in form, but without penalty or expressed consequences, have held that contracts entered into without compliance with the terms of the statute were valid, enforceable contracts as between the parties, and that one who had received and retained the benefits of such a contract could not raise the question of noncompliance."

In *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 79 Ann. Cas. 219, it was said: "There is very great conflict in the decisions of the state courts construing the effect of

foreign corporations with statutes imposing certain conditions to be per-

the failure of foreign corporations to comply with these laws. Numerous cases in the states of Alabama, Colorado, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, and Wisconsin hold that such failure to comply renders the contracts of foreign corporations absolutely void and unenforceable, and especially so where no criminal penalty attaches by the terms of the statute. This harsh doctrine naturally shocks the conscience. It virtually encourages the individual citizen to be dishonest and repudiate his obligations, and that, too, where he has reaped the full fruits and benefits of the contract. Very naturally, and rightly, the courts have sought to avoid the consequences of such vicious legislation and the moral turpitude its strict enforcement involves. We therefore find many other cases in the states of Arkansas, Colorado, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, North Dakota, Ohio, Rhode Island, South Dakota, Washington, and West Virginia, holding that such contracts are not void or unenforceable, but that foreign corporations which have failed to comply are nevertheless permitted to sue upon them. Some of these decisions are based upon the superior claim of the law of comity, others upon the assumption that the criminal penalty provided by the statutes is exclusive of all civil forfeiture of the contract. Other cases in Kentucky, North Dakota, Pennsylvania, South Dakota, and Washington, hold that, where a party has entered into a contract with a foreign corporation and has received the benefit thereof, he is estopped

from setting up the failure to comply with these statutes by the corporation, for the purpose of avoiding his liability on the contract. Still other cases hold that failure to comply with these statutes does not render its contracts wholly void, but only operates to suspend the right of the defaulting corporation to sue until it does comply. * * * It seems to us that the position last above referred to, holding the contract good, but suspending the remedy, is the reasonable and honest one to take. It may be admitted that some practical protection is afforded to the private citizen of a state by these statutes, in that they tend to keep out irresponsible foreign corporations seeking to impose upon such citizens; therefore it may well be demanded of foreign corporations that they shall carefully comply with these statutory conditions, and, in case they do not, the criminal penalty be enforced and the civil right to sue be suspended. But surely this is going far enough, for practically, under modern conditions, the largest proportion of the commercial and other business transactions occurring are carried on under corporate franchises, and busy corporations, like busy individuals, may forget, or overlook to comply, or make mistakes in compliance with these conditions—a failure not *malum in se*, but simply *malum prohibitum*. On the other hand, for individuals to repudiate the obligations of honest contracts of which they have derived the benefit involves moral turpitude of the gravest character, and neither legislatures nor courts can afford to encourage them in so doing. The law should protect its citizens, but, by such protection, should not teach them to be dishonest.”

See also *Model Heating Co. v. Ma-*

formed by foreign corporations, it will be necessary to classify the penalties provided by such statutes for noncompliance, and upon an examination of the various statutes it will be found that they may be classified under the following heads.

(1) Statutes which merely prohibit foreign corporations from doing business or taking, holding or disposing of property in the state until they have complied with certain conditions precedent, without declaring the transaction in violation thereof void, or prescribing any penalty;

(2) Statutes which merely prescribe a fine or other specific penalty for such noncompliance;

(3) Statutes which merely suspend the remedy until the corporation has complied with the conditions imposed;

(4) Statutes prohibiting a foreign corporation which fails to comply with its provisions from maintaining any suit in any court of the state;

(5) Statutes prohibiting a foreign corporation from maintaining an action upon any contract made in the state unless prior to the making of such contract it has procured a certificate;

(6) Statutes providing that contracts made by the corporation shall be absolutely void;

(7) Statutes providing that contracts made by a foreign corporation shall be "wholly void on its behalf";

(8) Statutes imposing a penalty for noncompliance with statutory requirements but providing that noncompliance shall not invalidate a contract entered into by the corporation.

§ 5942. Statutes merely prohibiting foreign corporations from doing business until compliance therewith. There is a conflict of authority as to the effect of the failure of foreign corporations to comply with a statute which merely prohibits foreign corporations from doing business or taking or disposing of property in the state until they have complied with conditions precedent imposed by the statute, without declaring that transactions in violation of the statute shall be void, or prescribing any penalty. Some of the courts have held that contracts, conveyances and other transactions in violation of such a statute are not void, but that the only effect is to render the corporation subject to proceedings by the state to oust it from doing business, and that, until the state had proceeded against it, actions may be brought by it on its contracts and to protect its

garity, 1 Boyce (Del.) 246, 75 Atl. 614, considering the different views.

property.²² Some courts reach this result by applying the doctrine

²² **United States.** *Boatmen's Bank of St. Louis v. Fritzen*, 175 Fed. 183, certiorari denied 238 U. S. 641, 59 L. Ed. 1501 (mem. dec.).

Massachusetts. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252, 53 N. E. 855, distinguishing *Claffin v. United States Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293, on the ground that the business transacted by the defendant in that case was prohibited to all insurers by the Massachusetts insurance act of 1887; *C. B. Rogers & Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580.

New Mexico. *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701.

North Dakota. *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285; *United States Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

Oklahoma. *Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139, 99 Pac. 785.

South Dakota. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, aff'd on rehearing, 4 S. D. 237, 55 N. W. 931.

In *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, quoting with approval *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, the court said: "The cases which we have cited from the various classes demonstrate, perhaps, the lack of uniformity with more certainty than they point to the correct rule of construction. Yet, when studied, the cases are all found seeking one common object,—the legislative purpose. 'The intent of the lawmaker is the law'; the embarrassment is in declaring that intent. This intention may be declared in the act, or it may be inferred from its provisions in connection with the subject-matter and

circumstances. *Howell v. Stewart*, 54 Mo. 400; *Machine Co. v. Caldwell*, 54 Ind. 279. In the statute under discussion the legislature specified reasonable terms upon which a foreign corporation could launch its business over the entire state, unquestioned by private interests or sovereign power. Whatever may have been the primary purpose of the legislature, it certainly was not to exclude foreign corporations from the state. Nor is it reasonable to presume that it was the legislative intent to declare all contracts made by foreign corporations without compliance with the statute absolutely void. It were a reflection upon legislative wisdom to presume that consequences so unusually harsh and oppressive were expected to flow from the use of language so mild and uncertain. Our statute is a simple inhibition. It declares no penalty. It does not declare the transaction of business unlawful or contracts void. We may well use the language of Justice Swayne in *Bank v. Matthews*, supra [98 U. S. 621, 25 L. Ed. 188]: 'The statute does not declare such a security void. It is silent upon the subject. If Congress so meant it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of legislative and judicial decision.' The statute by its terms places foreign corporations upon an equality with domestic corporations in the matter of the publicity of the purposes of their creation and their powers, and in the matter of convenience and certainty with which process may be served upon them. It is not possible to read the statute without perceiving this to have been the primary purpose of its enactment. These objects are, or may be, highly necessary

of estoppel, as will be seen in discussing the question elsewhere.²³

The view that a statute which is prohibitory in form, with no penalty attached, and silent as to the consequences of noncompliance does not render the contracts entered into with a corporation before compliance by it with such statute unenforceable and void, is, however, contrary to the weight of authority. Most of the courts hold that the object of the statute is to prohibit foreign corporations, on grounds of public policy, from doing any business in the state until they have complied with all the conditions precedent prescribed by the statute, that this prohibition is absolute and renders illegal a contract made by a foreign corporation in the state in violation of the statute, and that since the contract is thus illegal, the corporation cannot maintain an action to enforce it.²⁴ The cases which hold to this

for the protection and convenience of our citizens dealing with such corporations. The legislature, having specified the duties of the foreign corporation, provided, in chapter 26 of the Civil Code, the means of their enforcement, and made it the duty of every prosecuting attorney to see that such conditions were fulfilled, or the corporation barred from the exercise of any corporate franchise within this state. This we believe to have been the remedy, and the only remedy, in the mind of the legislature. These respondents dealt with appellant as a corporation. They received and retained its property, and executed their obligation to pay for the same. The corporation has fulfilled its contract, and now respondents, without offering to return the consideration for their note, ask that they be released from the performance of their contract, for no reason other than the failure of appellant to perform a duty that it owed to the state at large, but the nonperformance of which in no manner prejudiced respondents. We are unwilling to ingraft upon a silent statute a consequence so inequitable."

See also *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411; *National*

Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285.

²³ See §§ 5951-5953, *infra*.

²⁴ *United States. Pittsburgh Const. Co. v. West Side Belt R. Co.*, 154 Fed. 929, 11 L. R. A. (N. S.) 1145; *Diamond Glue Co. v. United States Glue Co.*, 103 Fed. 838, *aff'd* 187 U. S. 611, 47 L. Ed. 328; *McCanna & Fraser Co. v. Citizens Trust & Surety Co. of Philadelphia*, 74 Fed. 597; *Lamb v. Lamb*, 6 Biss. 420, Fed. Cas. No. 8,018; *Northwestern Mut. Life Ins. Co. v. Elliott*, 7 Sawy. 17, 5 Fed. 225; *Semple v. Bank of British Columbia*, 5 Sawy. 88, Fed. Cas. No. 12,659; *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078.

Alabama. George M. Muller Mfg. Co. v. First Nat. Bank of Dothan, 176 Ala. 229, 57 So. 762; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 So. 961; *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341; *Armour Packing Co. of Louisiana v. Vinegar Bend Lumber Co.*, 149 Ala. 205, 13 Ann. Cas. 951, 42 So. 866; *Hanchey v. Southern Building & Loan Ass'n*, 140 Ala. 245, 37 So. 272; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275; 7 So. 200; *Dudley v. Collier*, 87 Ala. 431, 13

view are based largely upon the thought that, inasmuch as there is no penalty of forfeiture provided in the statute for a disregard of its

Am. St. Rep. 55, 6 So. 304, distinguishing *Sherwood v. Avis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307. Compare *American Loan & Trust Co. v. East & West R. Co.*, 37 Fed. 242, construing the Alabama Constitution.

Delaware. See *E. A. Strout Co. v. Howell*, 2 Boyce 489, 82 Atl. 238; *Model Heating Co. v. Magarity*, 1 Boyce 240, 75 Atl. 614; *Beeber v. Walton*, 7 Houst. 471, 32 Atl. 777.

Illinois. *Pennsylvania Co. for Insurance on Lives, etc. v. Bauerle*, 143 Ill. 459, 33 N. E. 166; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.

Indiana. *State v. Briggs*, 116 Ind. 55, 18 N. E. 395; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Farmers' & Merchants' Ins. Co. v. Harrah*, 47 Ind. 236; *Union Cent. Life Ins. Co. v. Thomas*, 46 Ind. 44; *Hoffman v. Banks*, 41 Ind. 1; *Daniels v. Barney*, 22 Ind. 207; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520.

Kentucky. *Franklin Ins. Co. v. Louisville & A. Packet Co.*, 9 Bush 591.

Maine. *Buxton v. Hamblen*, 32 Me. 448.

Massachusetts. *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Williams v. Cheney*, 8 Gray 206; *Washington County Mut. Ins. Co. v. Dawes*, 6 Gray 376; *Jones v. Smith*, 3 Gray 500. Compare, however, *Enterprise Brewing Co. v. Grimes*, 173 Mass. 252, 53 N. E. 855.

Michigan. *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147; *People's Mut. Ben. Society v. Lester*, 105 Mich. 716, 63 N. W. 977; *Seamans v. Temple Co.*, 105 Mich. 400, 28 L. R. A. 430, 55 Am. St. Rep. 457, 63 N. W. 408.

Minnesota. *Seamans v. Christian*

Bros. Mill Co., 66 Minn. 205, 68 N. W. 1065.

Missouri. *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461; *United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; *Farrand Co. v. Walker*, 169 Mo. App. 602, 155 S. W. 68; *Ehrhardt v. Robertson*, 78 Mo. App. 404; *Blevins v. Fairley*, 71 Mo. App. 259; *Williams v. Scullin*, 59 Mo. App. 30.

Nebraska. *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221.

New Jersey. *Stewart v. Northampton Mut. Live Stock Ins. Co.*, 38 N. J. L. 436.

New York. *Neuchatel Asphalt Co. v. New York*, 9 Misc. 376, 30 N. Y. Supp. 252; *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.*, 25 Wend. 648; *Pennington & Kean v. Townsend*, 7 Wend. 276.

Ohio. *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388.

Oregon. *Hacheny v. Leary*, 12 Ore. 40, 7 Pac. 329; *Bank of British Columbia v. Page*, 6 Ore. 431.

Pennsylvania. *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552; *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89; *Western Massachusetts Mut. Fire Ins. Co. v. Girard Point Storage Co.*, 19 Pa. Co. Ct. 113; *In re Office Specialty Mfg. Co.*, 12 Pa. Co. Ct. 44. See *Pittsburgh Const. Co. v. West Side Belt R. Co.*, 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

Tennessee. *Advance Lumber Co. v. Moore*, 126 Tenn. 313, 148 S. W. 212; *Harris v. Columbia Water & Light Co.*, 108 Tenn. 245, 67 S. W. 811; *Law Guarantee & Trust Co. v. Jones*, 103 Tenn. 245, 58 S. W. 219; *New York*

terms, there remains no method of its enforcement, other than to declare all contracts made in disregard of the statutory provisions unenforceable.²⁵

Nat. Building & Loan Ass'n v. Cannon, 99 Tenn. 344, 41 S. W. 1054; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; First Nat. Bank v. Coughron (Tenn. Ch. App.), 52 S. W. 1112; Illinois Building & Loan Ass'n v. Walker (Tenn. Ch. App.), 42 S. W. 191; Myers Mfg. Co. v. Wetzel (Tenn. Ch. App.), 35 S. W. 896; Cumberland Land Co. v. Canter Lumber Co. (Tenn. Ch. App.), 35 S. W. 886.

Vermont. Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526.

West Virginia. Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362.

Wisconsin. Aetna Ins. Co. v. Harvey, 11 Wis. 394.

In a leading Illinois case, where a statute provided that it should not be lawful for any agent or agents of a foreign insurance company to directly or indirectly take risks or do or transact any business of insurance in the state, without first procuring a certificate of authority from the auditor of the state; and that, before obtaining such certificate, such agent should furnish the auditor with a statement setting forth certain facts as to the company, together with a written instrument, under the seal of the company, and signed by the president and secretary, authorizing such agent to acknowledge service of process on behalf of the company, etc., it was held that the statute was intended absolutely to prohibit and prevent foreign insurance companies from making any contract of insurance in the state without having first complied with the prescribed conditions, and that, as a result of such prohibition, a note taken in the state by a foreign insurance company for stock and premiums, without having complied with the stat-

ute, was void, and no action could be maintained thereon by the company. Walker, J., said: "To permit the company, when they admit that they have disregarded all these requirements, to recover, would be for the courts to disregard the clearly expressed will of the general assembly, and to say what it has said shall be unlawful, is and shall be lawful and binding. To enforce the payment of this note would be, virtually, to repeal a plain enactment of the legislature. When the legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not, offering a premium to violate a law, certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee we entertain no doubt." Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

²⁵ **United States.** In re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078.

Illinois. Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Indiana. Farmers' & Merchants'

It will be seen that the authorities are hopelessly divided in respect to the effect of noncompliance by a foreign corporation with a statute such as that now under consideration, and even in the same state conflicting decisions are found. Thus the Supreme Court of Indiana has said: "Upon the subject as to whether contracts, entered into in this state by foreign corporations, when they have failed to comply with our statutes prescribing their duties, are void or otherwise, our adjudged cases are in the utmost confusion. It is utterly impossible to reconcile them."²⁶ The federal courts have steadily adhered, how-

Ins. Co. v. Harrah, 47 Ind. 236; Union Cent. Life Ins. Co. v. Thomas, 46 Ind. 44; Hoffman v. Banks, 41 Ind. 1.

North Dakota. Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544.

Oregon. Hacheny v. Leary, 12 Ore. 40, 7 Pac. 329; Bank of British Columbia v. Page, 6 Ore. 431.

The Supreme Court of Oregon in so holding, said: "The general rule is that a contract in violation of law is void. The only exception to the rule is, that when the law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of such statute is not void. * * * We do not think this statute belongs to the excepted class. The legislature has prohibited the contract. It provided no penalty for its violation. Unless the contract shall be held void the statute is of no effect." Bank of Columbia v. Page, 6 Ore. 431.

²⁶ Phoenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970. Coffey, C. J., after using the language quoted, said: "In the case of Insurance Co. v. Slaughter, 20 Ind. 520, it was held that all such contracts were void; but this case was, in effect, overruled by the later cases of Deming v. State, 23 Ind. 416, and Insurance Co. v. Robinson, 25 Ind. 536. In the case of Walter A. Wood, etc., Co. v. Caldwell, 54 Ind. 270, the

case first above named is expressly recognized as being overruled by the two last cases named; but, notwithstanding this fact, it was again cited with approval in the case of Cassaday v. American Insurance Co., 72 Ind. 95. A careful examination of our cases will disclose the fact, however, we think, that there is now no case in this state which holds that a policy of insurance issued to one of our citizens by a foreign insurance company which has failed to comply with our statute upon the subject of foreign insurance companies is void. There is one line of decision which holds that a contract entered into by a citizen of the state with a foreign corporation which has not complied with the statute, by the terms of which the citizen has bound himself to the corporation, is void, while another line of decision holds that such contract is not void, but that the right to enforce it is suspended until the corporation has complied with the statute. Insurance Co. v. Thomas, 46 Ind. 44; Cassaday v. American Insurance Co., 72 Ind. 95; Hoffman v. Banks, 41 Ind. 1; Behler v. Insurance Co., 68 Ind. 347; Insurance Co. v. Robinson, 25 Ind. 536; Walter A. Wood, etc., Co. v. Caldwell, 54 Ind. 270; Sewing-Machine Co. v. Hatfield, 58 Ind. 187; Daly v. Insurance Co., 64 Ind. 1; Manufacturing Co. v. Brown, 64 Ind. 548; Johnson v. State, 65 Ind. 204; Smith v. Little, 67 Ind. 549; Insurance Co. v. Wellman,

ever, to the rule that, in the absence of an express provision of the statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts are done, are valid and enforceable.²⁷

§ 5943. Statutes merely prescribing a penalty. The statutes imposing a specific penalty upon a foreign corporation which does business in the state without compliance with certain prescribed conditions

69 Ind. 413; *Manufacturing Co. v. Effinger*, 79 Ind. 264; *Finch v. Insurance Co.*, 87 Ind. 302; *Elston v. Piggott*, 94 Ind. 14. It is unnecessary, in this case, to inquire which of these conflicting lines of decision is correct, as we are dealing here with a policy of insurance. It may not be improper to remark in passing, however, that this court seems to have settled down upon the doctrine that such contracts are not void, but that the right of the corporation to enforce such contracts is suspended until it has complied with the terms of the statute, and that a failure to perform the duty required by law can only be taken advantage of by way of plea in abatement. *Elston v. Piggott*, supra.”

²⁷*Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893. The court said: “There was no provision in these statutes which inflicted the penalty of the invalidity of contracts made, or business done, without a compliance with them, nor was there any express prohibition of the conduct of such business before the laws were complied with. As there was nothing morally wrong in the acts of the appellee, as it was not the primary purpose of the statutes under consideration to invalidate such acts or contracts, and as the statutes contain neither express provision nor clear intimation that this was the intent of the legislators, it is not the province of the courts to do so. While the au-

thorities upon this question are variant and conflicting in the state courts, the federal courts have steadily adhered to the rule, which is sustained by the better reason and the more persuasive opinions in the courts of the states, that, in the absence of an express provision of statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with the statutes permitting it to do business in the state where the contracts are made and the acts are done are, nevertheless, valid and enforceable, because it is not the intent of the authors of such laws to strike down such agreements and acts when they are not evil in themselves. *Whitney v. Wyman*, 101 U. S. 392, 27 L. Ed. 1050; *Washburn Mill Co. v. Bartlett* (N. D.), 54 N. W. 544, 546, 547; *Wright v. Lee* (S. D.), 51 N. W. 706; *Fortier v. Bank*, 112 U. S. 439, 28 L. Ed. 764; *Reynolds v. Bank*, 112 U. S. 405, 28 L. Ed. 733; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339; *Merrick v. Reynolds Engine & Governor Co.*, 101 Mass. 381, 384; *Enterprise Brew. Co. v. Grimes* (Mass.), 53 N. E. 855, 856; *National Cash Register Co. v. Wilson* (N. D.), 81 N. W. 285; *Neuchatel Asphalt Co. v. The Mayor*, 155 N. Y. 373, 376, 49 N. E. 1043; *Simplex Dairy Co. v. Cole*, 86 Fed. 739, 741.”

vary. Some, while prohibitory in form, attach a specific penalty for doing or failing to do certain specific things. Others, while not prohibitory in form, attach a specific penalty for doing or not doing certain things. In the decisions construing these statutes there is found an unreconcilable conflict of authority in the state courts as to the effect of noncompliance by foreign corporations with their requirements.²⁸

Some of the courts hold that where a statute prohibiting a foreign corporation from doing business in the state without first complying with certain conditions prescribes a specific penalty for violation of the statute, the penalty so prescribed is exclusive, and that contracts made by a foreign corporation without having complied with the statute may be enforced by it.²⁹ The reason generally given for so holding

²⁸ **United States.** *Johnson v. New York Breweries Co.*, 178 Fed. 513; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.

Delaware. See *Model Heating Co. v. Magarity*, 1 Boyce 240, 75 Atl. 614, rev'd 2 Boyce 459, L. R. A. 1915 B 665, 81 Atl. 394.

Indiana. *Phoenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970.

North Dakota. *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

Rhode Island. *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948, distinguishing *Electric News & Money Transfer Co. v. Perry*, 75 Fed. 898.

South Dakota. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 4 S. D. 237, 55 N. W. 931.

²⁹ **United States.** *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317; *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *Meador Furniture Co. v. Commercial Nat. Safe Deposit Co.*, 192 Fed. 616; *Jarvis-Conklin Mortg. Trust Co. v. Willhoit*, 84 Fed. 514; *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809; *Northwestern Mut. Life Ins. Co. v. Overholt*, 4 Dill. 287, Fed. Cas. No. 10,338. See *Dunlop v. Mercer*, 156

Fed. 545, construing *Minn. Rev. Laws*, §§ 2888, 2889, 2890.

Arkansas. *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203, 113 Am. St. Rep. 139, 7 Ann. Cas. 217, 91 S. W. 306; *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152; *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 29 L. R. A. 712, 54 Am. St. Rep. 191, 31 S. W. 157.

Colorado. *Kindel v. Beck & Pauli Lithographing Co.*, 19 Colo. 314, 24 L. R. A. 311, 35 Pac. 538; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 121, 47 Pac. 848; *Uteley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369.

Delaware. *Model Heating Co. v. Magarity*, 2 Boyce 459, L. R. A. 1915 B 665, 81 Atl. 394, rev'g 1 Boyce 240, 75 Atl. 614, and distinguishing *Beeher v. Walton*, 7 Houst. 471, 32 Atl. 777. Compare *E. A. Strout Co. v. Howell*, 2 Boyce 489, 82 Atl. 238.

Iowa. *Pennypacker v. Capital Ins. Co.*, 80 Iowa 56, 8 L. R. A. 236, 20 Am. St. Rep. 395, 45 N. W. 408; *Pangborn v. Westlake*, 36 Iowa 546.

Kansas. *State v. American Book*

is that the legislature, by annexing a penalty for noncompliance on the part of the corporation, manifested its legislative purpose that the penalty should be exclusive of all other consequences of noncompliance.³⁰ Other courts have held, under similar statutes, that the stat-

Co., 69 Kan. 1, 1 L. R. A. (N. S.) 1014, 2 Ann. Cas. 56, 76 Pac. 411.

Louisiana. Thomas Cusack Co. v. Ford, 138 La. 1096, 71 So. 196.

Maryland. Kendrick Roberts v. Warren Bros. Co., 110 Md. 47, 72 Atl. 461.

Massachusetts. C. B. Rogers & Co. Corporation v. Simmons, 155 Mass. 259, 29 N. E. 580, construing Acts of 1884, c. 330, which, after requiring the appointment by foreign corporations of an agent for the service of process, and imposing penalties for failure to comply, provides that noncompliance shall not affect the validity of contracts.

Missouri. Clark v. Middleton & Riley, 19 Mo. 53; Columbus Ins. Co. v. Walsh, 18 Mo. 229.

Montana. Powder River Cattle Co. v. Commissioners of Custer County, 9 Mont. 145, 22 Pac. 383; Garfield Mining & Milling Co. v. Hammer, 6 Mont. 53, 8 Pac. 153.

Nebraska. Holt v. Rust-Owens Lumber Co., 2 Neb. (Unof.) 170, 96 N. W. 613.

Nevada. United States Fidelity & Guaranty Co. v. Marks, 37 Nev. 306, 142 Pac. 524.

New Hampshire. Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; Connecticut River Mut. Fire Ins. Co. v. Whipple, 61 N. H. 61.

North Carolina. G. Ober & Sons Co. v. Katzenstein, 160 N. C. 439, 76 S. E. 476.

Ohio. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67.

Oregon. See Hirschfeld v. McCullagh, 64 Ore. 502, 130 Pac. 1131, aff'g judgment on rehearing 127 Pac. 541.

Rhode Island. Garratt Ford Co. v.

Vermont Mfg. Co., 20 R. I. 187, 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948, distinguishing Electric News & Money Transfer Co. v. Perry, 75 Fed. 898.

South Carolina. Galletley v. Strickland, 74 S. C. 394, 54 S. E. 576.

Washington. Latshaw v. Western Townsite Co., 91 Wash. 575, 158 Pac. 248; Horrell v. California, O. & W. Homebuilders' Ass'n, 40 Wash. 531, 82 Pac. 889; La France Fire Engine Co. v. Town of Mt. Vernon, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; Edison General Elec. Co. v. Canadian Pac. Nav. Co., 8 Wash. 370, 24 L. R. A. 315, 40 Am. St. Rep. 910, 36 Pac. 260; Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327.

West Virginia. Underwood Type-writer Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664; Burkheimer v. National Mut. Building & Loan Ass'n, 59 W. Va. 209, 4 L. R. A. (N. S.) 1047, 53 S. E. 372; Thompson v. National Mut. Building & Loan Ass'n, 57 W. Va. 551, 50 S. E. 756; Ober v. Stephens, 54 W. Va. 354, 46 S. E. 195; Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37.

³⁰ **United States.** Fritts v. Palmer, 132 U. S. 282, 33 L. Ed. 317; Harris v. Runnels, 12 How. 79, 13 L. Ed. 901.

Missouri. Columbus Ins. Co. v. Walsh, 18 Mo. 229.

Ohio. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67.

Washington. Latshaw v. Western Townsite Co., 91 Wash. 575, 158 Pac. 248.

West Virginia. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25

ute, although it imposes a specific penalty, is intended as a prohibi-

Am. St. Rep. 925, 11 S. E. 37.

In *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37, the court said: "This statute, being not only in derogation of common law, but penal in its character, must be construed strictly. There is certainly no public policy of this state which is contravened by permitting corporations such as the plaintiff here to do business in the state, because the statute expressly authorizes them to do so upon compliance with its requirements. The evident purpose of these requirements of the statute is to protect parties dealing with foreign corporations from imposition, and to secure convenient means of obtaining jurisdiction in the local courts of the state and information such as will facilitate the service of process upon such corporations. It is clearly not the primary purpose of the legislature, in passing such statutes, to render the contracts and dealings of such corporations which have not complied with these requirements void and unenforceable. Hence the decided weight of authority is that, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground it has been held that a contract made by a foreign corporation before it has complied with the statutory requisites to the right to do business will not, on that account be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others.

* * * We are aware that the courts of Indiana, Illinois, Wisconsin, and perhaps some other states hold a different doctrine. In Vermont and Oregon it has been held that a noncompliance with the precedent conditions of the statute of those states by foreign corporations rendered their contracts void. But it will be observed that these statutes imposed no penalty for the failure to comply with their provisions; and it is principally upon this ground that the contracts are held void, because otherwise the statutes might be evaded with impunity. Thus in *Bank v. Page*, 6 Ore. 431, 436, the court says: 'The general rule is that a contract in violation of law is void. The only exception to the rule is that, when a law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of such statute is not void.' It is evidently the want of such penalty in the statute that influenced the court to hold the contract void. And such seems to be the ground of the decisions in Indiana and other states. * * * Let us apply these principles to our statute. The first provision is that the foreign corporation may do business in this state 'upon complying with the requirements of this section, and not otherwise.' It next declares that such corporation, so complying, shall have the same rights and privileges, and be subject to the same liabilities, as domestic corporations; and it finally imposes a penalty upon such corporation for its failure to comply with the regulations of the statute. There is here no express declaration that the failure to comply shall render the contracts of the corporation absolutely void. Nor does it affirmatively ap-

tion against doing business and making contracts before compliance with the conditions, and that contracts made without such compliance are none the less illegal and unenforceable by the corporation because the statute imposes a specific penalty for its violation, or, in other words, that the annexation of penalty renders all acts which subject the party to the penalty unlawful, and hence unenforceable, on the universally accepted proposition that no cause of action can be based upon an unlawful transaction.³¹ There is another class of cases,

pear that the legislature so intended. But it is expressly provided, and so declared, that a failure to comply with the regulations prescribed shall be punished by fine; and this imposition of a penalty, as we have seen, in the absence of any express declaration to the contrary, must be held to be exclusive of all other penalties. That such was the purpose of the legislature in enacting this statute, is manifest from the provisions therein in respect to railroad corporations. It prescribes additional regulations for such companies, and declares that, unless they are complied with, such companies shall not maintain any action or suit in this state. The whole section shows no purpose to treat railroad corporations with more favor than other corporations; yet, if we hold the contracts of all other corporations absolutely void, while only denying to railroad companies the right to sue in our courts, the effect would be to discriminate in favor of the latter."

"In *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317, 10 Sup. Ct. Rep. 93, a tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from purchasing or holding land in that state until it should acquire the right to do business therein by fulfilling certain prescribed conditions. Here the Missouri corporation had unquestionably violated the laws of Colorado when it

purchased the property without having previously designated its place of business and an agent, as required by the Colorado statute. The only penalty which that statute provided, however, for noncompliance with these provisions, was that the officers, agents, and stockholders should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held the fair implication to be that, in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute prescribing the terms upon which foreign corporations might do business in that state; and hence the judiciary ought not to inflict the additional and harsh penalty of forfeiting the estate which had been conveyed to the Missouri corporation. In other words, the court refused to treat the conveyance as void, notwithstanding that it was made to a corporation which was forbidden to receive it." Mr. Justice Hughes in *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914 A 699.

³¹ *United States*. *Montgomery Traction Co. v. Montgomery Light & Water Power Co.*, 229 Fed. 672, aff'd 219 Fed. 963; *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *In re Caneuh Pine Lumber & Manufacturing Co.*, 180 Fed. 249; *Pittsburgh Const. Co. v. West Side Belt R. Co.*, 151 Fed. 125. See also *Dunlop v. Mercer*, 156 Fed. 545.

Alabama. *Alexander v. Alabama*

which holds that where the statute annexes a penalty, contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business,

Western R. Co., 179 Ala. 480, 60 So. 295; George M. Muller Mfg. Co. v. First Nat. Bank of Dothan, 176 Ala. 229, 57 So. 762; Dundee Mortgage & Trust Inv. Co. v. Nixon, 95 Ala. 318, 10 So. 311; Boulden v. Estey Organ Co., 92 Ala. 182, 9 So. 283; Christian v. American Freehold Land & Mortgage Co., 89 Ala. 198, 7 So. 427; Farrior v. New England Mortgage Security Co., 88 Ala. 275, 7 So. 200; Dudley v. Collier, 87 Ala. 431, 13 Am. St. Rep. 55, 6 So. 304; Citizens Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82, certiorari denied ex parte Buckheit, 196 Ala. 700, 72 So. 1019; Peters v. Brunswick-Balke-Collender Co., 6 Ala. App. 507, 60 So. 431. See Montgomery Traction Co. v. Montgomery Light & Water Power Co., 229 Fed. 672, aff'g 219 Fed. 963.

Illinois. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650; Hunter W. Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521, aff'g 146 Ill. App. 257; Pennsylvania Co. for Insurance on Lives, etc., v. Bauerle, 143 Ill. 459, 33 N. E. 166; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Delta Bag Co. v. Kearns, 160 Ill. App. 93; Oil Paint & Drug Pub. Co. v. Stroud, 156 Ill. App. 312; Erie & M. Ry. & Nav. Co. v. Central Ry. Equipment Co., 152 Ill. App. 278; United Lead Co. v. Reedy Elevator Co., 124 Ill. App. 174, aff'd 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567.

Indiana. State v. Briggs, 116 Ind. 55, 18 N. E. 395; Cassaday v. American Ins. Co., 72 Ind. 95; Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Hoffmann v. Banks, 41 Ind. 1; Barney v. Daniels, 32 Ind. 19; Daniels v. Barney, 22 Ind. 207.

Kentucky. Hayes v. West Virginia Oil, Gas & By-Products Co., 210 S. W.

174; Bondurant v. Dahnke-Walker Milling Co., 175 Ky. 774, 195 S. W. 139; Oliver Co. v. Louisville Realty Co., 156 Ky. 628, 51 L. R. A. (N. S.) 293, 161 S. W. 570; Fruin-Colnon Contracting Co. v. Chatterson, 146 Ky. 504, 40 L. R. A. (N. S.) 857, 143 S. W. 6; Franklin Ins. Co. v. Louisville & A. Packet Co., 9 Bush 590.

Maine. Buxton v. Hamblen, 32 Me. 448.

Massachusetts. Reliance Mut. Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; Miller v. Post, 1 Allen 434.

Michigan. Seaman v. Temple Co., 105 Mich. 400, 28 L. R. A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; American Ins. Co. of Chicago v. Stoy, 41 Mich. 385, 1 N. W. 877.

Mississippi. Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211.

New Jersey. Stewart v. Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436.

New York. Swing v. Dayton, 124 App. Div. 58, 108 N. Y. Supp. 155; Pennington & Kean v. Townsend, 7 Wend. 276.

Pennsylvania. Johnson v. Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Thorne v. Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Holt v. Green, 73 Pa. St. 198, 13 Am. Rep. 737.

Tennessee. Interstate Amusement Co. v. Albert, 128 Tenn. 417, 161 S. W. 488; New York Nat. Building & Loan Ass'n v. Cannon, 99 Tenn. 344, 41 S. W. 1054; Myers Mfg. Co. v. Wetzel, 35 S. W. 896; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743.

Vermont. Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; Elkins v. Parkhurst, 17 Vt. 105.

Wisconsin. Aetna Ins. Co. v. Harvey, 11 Wis. 394.

but to accomplish some collateral object.³² Thus under a statute providing that foreign corporations incorporated for the purpose of carrying on business in the state shall, before they proceed to do business therein under the charter, file for record in the offices of the secretary of state and the recorder of the county in which they propose to carry on business, the charter, duly authenticated, or a copy thereof, and that any such corporation neglecting or refusing so to do within a specified time shall be deemed guilty of wilful negligence, and thereafter any person maintaining or prosecuting any civil action against such corporation may prove on the trial by general reputation the incorporation of the company, it was held that the only consequence which resulted from a failure to comply with the statute was that pointed out by the statutes and that foreign corporations were not prohibited from doing business in the state by failure to comply with the requirements of such statutes.³³ Under a statute providing that no foreign corporation shall carry on within the state the business for which it was incorporated, unless it shall appoint a resident attorney to accept service of process, and that no person shall act within the state as agent or officer of any such corporation, unless it shall have appointed an attorney to accept service of process, and every person so acting shall be fined in a specified sum, it was held that a foreign corporation, not having complied with such statute by appointing a resident attorney, could recover on a contract made by it in the state, as the purpose of the statute was not to invalidate contracts, but to require foreign corporations to appoint an attorney in the state upon whom service of process may be made, and this purpose was adequately served by imposing a penalty upon the agent who ventured to do business for the corporation without complying with the law.³⁴

32 United States. *Northwestern Mut. Life Ins. Co. v. Overholt*, 4 Dill. 287, Fed. Cas. No. 10,338.

Iowa. *Pangborn v. Westlake*, 36 Iowa 546.

Minnesota. *DeMers v. Daniels*, 39 Minn. 158, 59 N. W. 98.

Montana. *Garfield Mining & Milling Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *King v. National Mining & Exploration Co.*, 4 Mont. 1, 1 Pac. 727.

North Dakota. *Washburn Milling Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

Ohio. *Strong v. Darling*, 9 Ohio 201.
Pennsylvania. *Rahter v. First Nat. Bank*, 92 Pa. St. 393.

33 Garfield Mining & Milling Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; *King v. National Mining & Exploring Co.*, 4 Mont. 1, 1 Pac. 727.

34 Garratt Ford Co. v. Vermont Mfg. Co., 20 R. I. 187, 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948. The court said: "If the legislature intends to make such contracts as the one in suit invalid, it is easy to say so; but, in the absence of such a pro-

A statute providing that no foreign corporation which shall fail to comply with the statutory conditions precedent to its right to do business in the state can maintain any suit or action either legal or equitable in any of the courts of the state upon any demand, either legal or equitable, whether arising out of contract or tort, affords no authority for the maintenance of an action by the other parties to enjoin the enforcement of a contract entered into by a foreign corporation not having complied with such statutory requirements.³⁵

§ 5944. Statutes merely suspending the remedy. Sometimes a statute requiring a foreign corporation to file a certificate, appoint an agent, or comply with other conditions, merely provides, either in express terms or by implication, that a foreign corporation shall not be permitted to maintain suits in the courts of the state until the statute has been complied with. Such a statute does not render void or illegal contracts made in the state by a foreign corporation which has not complied with the conditions. It merely suspends the remedy, and, if a corporation complies with the statute after making a contract, it may sue thereon.³⁶ Under a statute requiring agents of all

vision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in this state upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law."

Under a statute providing that foreign corporations before they do any business in the state shall perform certain prescribed conditions, and that any such corporation failing to comply with the provisions of such statute "shall not be entitled to the benefits of the laws of this state relating to foreign corporations," it is held that the word "benefits" does not include the right to sue. *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734.

³⁵ *St. Avit v. Kettle River Co.*, 216 Fed. 872.

³⁶ **United States.** *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 7 Ann. Cas. 426; *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 7 Ann. Cas. 219; *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7; *Simplex Dairy Co. v. Cole*, 86 Fed. 739; *Caesar v. Capell*, 83 Fed. 403; *Sullivan v. Beck*, 79 Fed. 200; *Godard v. Creffield Mills*, 75 Fed. 818, aff'g 69 Fed. 141.

Arkansas. *J. R. Watkins Medical Co. v. Martin*, 132 Ark. 108, 200 S. W. 283; *Waxahachie Medicine Co. v. Daly*, 122 Ark. 451, 183 S. W. 741; *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203, 113 Am. St. Rep. 139, 7 Ann. Cas. 217, 91 S. W. 306; *Sutherland-Innes Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152. See *St. Louis Union Trust Co. v. Chicot County Cotton-Alfalfa Farm Co.*, 127 Ark. 577, 193 S. W. 69; *J. R. Watkins Medical Co. v. Williams*, 124 Ark. 539, 187 S. W. 653.

California. *Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426.

Colorado. *International Trust Co.*

foreign corporations, before entering upon the duties of their agency in the state, to file in a designated office certificates of their appoint-

v. A. Leschen & Sons Rope Co., 41 Colo. 299, 14 Ann. Cas. 861, 92 Pac. 727.

Indiana. Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753; Elston v. Piggott, 94 Ind. 14; Singer Mfg. Co. v. Effinger, 79 Ind. 264; American Ins. Co. v. Wellman, 69 Ind. 413; Behler v. German Mut. Fire Ins. Co., 68 Ind. 347; Johnson v. State, 65 Ind. 204; Singer Mfg. Co. v. Brown, 64 Ind. 548; Daly v. National Life Ins. Co. of United States of America, 64 Ind. 1; American Ins. Co. v. Pettijohn, 62 Ind. 382; Domestic Sew. Mach. Co. v. Hatfield, 58 Ind. 187; Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536.

Kansas. Ryan Live-Stock & Feeding Co. v. Kelly, 71 Kan. 874, 81 Pac. 470; Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418; State v. American Book Co., 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411.

Maine. Dominion Fertilizer Co. v. White, 115 Me. 1, 96 Atl. 1069.

Maryland. Kendrick & Roberts v. Warren Bros. Co., 110 Md. 47, 72 Atl. 461.

Massachusetts. E. & G. Theatre Co. v. Greene, 216 Mass. 171, 103 N. E. 301; National Mut. Fire Ins. Co. v. Pursell, 10 Allen 231.

Michigan. Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706.

Missouri. See, as supporting the rule stated in the text, Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772, which was followed in F. E. Creelman Lumber Co. v. De Lisle, 107 Mo. App. 615, 82 S. W. 205, and see also Wulff v. Armstrong Cork Co., 250 Mo. 723, 157 S. W. 615;

Hogan v. St. Louis, 176 Mo. 149, 75 S. W. 604; Frazier v. Rockport, 199 Mo. App. 80, 202 S. W. 266. Compare, however, Booth v. Scott, 205 S. W. 633; Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524, 184 S. W. 999; Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344, rev'g 101 Mo. App. 569, 74 S. W. 128; Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; Union Bank Note Co. v. Ajax Portland Cement Co., 155 Mo. App. 349, 137 S. W. 18; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636, which hold that under the Missouri statute a contract made by a foreign corporation which has not complied with the statutory conditions is void, and is not rendered enforceable by subsequent compliance with the conditions.

New York. Neuchatel Asphalt Co. v. New York, 155 N. Y. 373, 49 N. E. 1043, aff'g 12 Misc. 26, 33 N. Y. Supp. 64; Davis Provision Co. v. Fowler Bros., 20 App. Div. 626, 47 N. Y. Supp. 205, aff'd 163 N. Y. 580, 57 N. E. 1108; Providence Steam & Gas Pipe Co. v. Connell, 86 Hun 319, 33 N. Y. Supp. 482; Reedy Elevator Co. v. American Grocery Co., 23 Misc. 520, 51 N. Y. Supp. 874.

North Dakota. Will v. Bismarek, 36 N. D. 570, 163 N. W. 550.

Oregon. Vermont Farm Mach. Co. v. Hall, 80 Ore. 308, 156 Pac. 1073; Hirschfeld v. McCullagh, 64 Ore. 502, 130 Pac. 1131, aff'g judgment on rehearing 127 Pac. 541.

Rhode Island. Swift & Co. v. Little, 28 R. I. 108, 65 Atl. 615.

Washington. State v. Nichols, 47 Wash. 117, 91 Pac. 632; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash.

ment and their principal's consent to be sued, by service of process on the agents, in the courts of the state, by citizens having claims

122, 32 Pac. 1073. See *Boston Tow Boat Co. v. John J. Sesnon Co.*, 64 Wash. 375, 116 Pac. 1083.

"The penalties of the act in question are doubtless intended to compel an observance of its terms. When that is done, its purpose is accomplished, the condition upon which the right to maintain an action depends is performed, and the plaintiff can in the future prosecute it to a final judgment." *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87, 69 S. W. 572.

In construing a New York statute providing that no foreign stock corporation shall do business in the state without having first procured from the secretary of state a certificate that it has complied with all the requirements of the law to authorize it to do business in the state, and that the business of the corporation to be carried on therein is such as might lawfully be carried on by a domestic corporation incorporated for such or similar business, and that no corporation doing business in the state at the time of the passage of the statute shall do business therein after a certain time without having procured such certificate, though any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such time, and that no foreign corporation doing business in the state without such certificate shall maintain any action in the state upon any contract made by it therein until it shall have procured such certificate, Wallace, J., said: "The question here is whether the statute intends to prohibit such foreign corporations as are doing business here, without having procured the certificate required by the statute, from making any contracts within this

state in the course of that business, or whether its intention merely is to withhold any remedy in favor of such corporations upon such contracts until the certificate shall have been procured. Were it not for the last clause of the section, undoubtedly such contracts would be void, because they would be included in the general prohibition against doing business within the state. But, in view of that clause, such a conclusion is inadmissible without doing violence to the familiar principle of interpretation which requires effect to be given to all parts of a statute, and the several provisions to be harmonized, if possible, so as to allow each to have consistent operation. It is the manifest purpose of the statute to prescribe a regulation with which all corporations must comply, and to enforce the regulation by attaching consequences in the nature of punishment for delinquency. It excepts from its operation, for a limited period, those corporations which were doing business in this state at the time of its enactment, and which, if not thus excepted, might be compelled to forego their ordinary transactions pending the procuring of a certificate. It was but just that these corporations, which had acquired a business domicile here, with the implied sanction of the state, and had adjusted their business arrangements accordingly, should be allotted a reasonable time in which to comply with the regulation, without being in the meantime disabled or subjected to risk or loss. But this was no reason why they should be treated more leniently than other corporations if they should reject the privilege accorded to them. It was equitable and proper that there should be a temporary discrimination in their favor, but no conceivable reason can be suggested

arising out of transactions with such agents, and providing that the foreign corporations could not enforce in any court of the state any contracts made by their agents before compliance by them with the provisions of the statute, it was held that contracts were not made void by the statute, and that a compliance by the foreign corporation therewith before the commencement of the suit rendered contracts made by it before such compliance valid and enforceable in the courts of the state.³⁷ A statute providing that no foreign corporation shall maintain any action in the state upon any contract made by it therein, after the taking effect of such statute, "until it shall have fully complied with the requirements of this act," and have procured a certificate to that effect from the secretary of state, does not invalidate a contract made in the state by a corporation which has failed to comply with the requirements of the statute, but merely prohibits the right of enforcement of the contract by the corporation until it shall comply with the statute.³⁸ A statute providing that no action

entitling them to a permanent favoritism. It was just as desirable in the interests of the public that they should comply with the regulation prescribed as that other corporations should do so. When the several clauses of the statute are read together, they naturally suggest these considerations. Upon first impression, and upon analysis, the reasonable meaning of the statute would seem to be not to vitiate illegal contracts made in this state by foreign corporations doing business here without having procured a certificate, but to suspend as to such corporations any remedy upon their contracts during their delinquency." *Crefeld Mill v. Goddard*, 69 Fed. 141, *aff'd* 75 Fed. 818.

³⁷*Security & Savings Loan Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753; *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970; *Elston v. Piggott*, 94 Ind. 14; *American Ins. Co. v. Wellman*, 69 Ind. 413; *Singer Mfg. Co. v. Brown*, 64 Ind. 548; *Daly v. National Life Ins. Co. of United States of America*, 64 Ind. 1; *Domestic Sew. Mach. Co. v. Hatfield*, 58 Ind. 187; *Walter A. Wood*

Mowing & Reaping Mach. Co. v. Caldwell, 54 Ind. 270, 23 Am. Rep. 641.

³⁸*Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706. The court saying: "We are of the opinion counsel's contention must prevail, if we are to give any effect to the words 'until it shall have fully complied with the requirements of this act,' and that the language indicates an intention that the contract shall not be void, but that the right of enforcement by the corporation is prohibited until it complies with the act."

In *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706, the court distinguished *Seamans v. Temple*, 105 Mich. 400, 28 L. R. A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; *People's Mut. Ben. Society v. Lester*, 105 Mich. 716, 63 N. W. 977; *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147; *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714; *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 112 Am. St. Rep. 370, 4 Ann. Cas. 347, 99 N. W. 399, and pointed out that those cases were under a different statute, which made the contracts void.

shall be maintained or recovery had in any of the courts of the state by any corporation doing business in the state without first complying with the requirements of the statute does not render void a contract made before such compliance.³⁹

Under a statute which merely suspends the remedy until the foreign corporation complies with its requirements, when a foreign corporation sues on a contract before it has complied with the conditions, the proper plea or answer is in abatement, and not in bar.⁴⁰

§ 5945. Statutes prohibiting actions on contracts made in state before compliance. Sometimes a statute prescribing conditions upon which a foreign corporation may do business in the state provides that no such corporation shall maintain any action in the state upon any contract made by it in the state unless prior to the making of such contract it shall have complied with the statutory requirements. It is held that under such a statute the right of action on a contract made by a foreign corporation in the state is lost unless the statute was complied with by the corporation before the contract was entered into, and that compliance with the statute before the commencement of the suit is insufficient.⁴¹ Under a statute providing that

³⁹ *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Hamilton v. Reeves & Co.*, 69 Kan. 844, 76 Pac. 418; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863; *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 76 Pac. 411. See also *De Camp v. Warren Mortg. Co.*, 65 Kan. 860, 70 Pac. 581.

⁴⁰ See the cases cited in note 36, *supra*.

⁴¹ **United States.** See *Boston Tow Boat Co. v. John J. Sesnon Co.*, 64 Wash. 375, 116 Pac. 1083.

Idaho. *Junction Placer Min. Co. v. Reed*, 28 Idaho 219, 153 Pac. 564; *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873.

Illinois. *Joseph T. Ryerson & Son v. Shaw*, 277 Ill. 524, 115 N. E. 650; *United Lead Co. v. Reedy Elevator Mfg. Co.* 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567; *United States Gypsum Co. v. Central Ry. Equipment Co.*, 152 Ill. App. 467; *Erie & M. Ry. &*

Nav. Co. v. Central Ry. Equipment Co., 152 Ill. App. 278.

Missouri. *Union Bank Note Co. v. Ajax Portland Cement Co.*, 155 Mo. App. 349, 137 S. W. 18.

New York. *Welsbach Mfg. Co. v. Norwich Gas & Electric Co.*, 96 App. Div. 52, 89 N. Y. Supp. 284; *Dunbarton Flax Spinning Co. v. Greenwich & J. R. Co.*, 87 App. Div. 21, 83 N. Y. Supp. 1054; *Seibert v. Dunn*, 70 Misc. 422, 126 N. Y. Supp. 974; *South Amboy Terra Cotta Co. v. Peorschke*, 45 Misc. 358, 90 N. Y. Supp. 333; *Schwartzwaelder Co. v. Silverman*, 134 N. Y. Supp. 1114.

Oklahoma. *Goodner Krumm Co. v. J. L. Owens Mfg. Co.*, 51 Okla. 376, 152 Pac. 86.

Under a statute imposing a license tax upon foreign corporations doing business in the state and providing that a foreign corporation which had done business in the state for twelve months prior to the passage of the

no foreign corporation shall carry on within the state the business for which it was incorporated, or enforce in the courts of the state any contract made within the state, unless it shall have complied with the requirements of the statute, it was held that compliance by the corporation with such requirements subsequent to the making of a contract within the state, but prior to the commencement of an action for the breach of such contract, is a compliance with the statute which will authorize the corporation to maintain the action.⁴² Under a statute providing that no foreign corporation can maintain any suit or action, either legal or equitable, in any of the courts of the state upon any demand whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had taken certain steps requisite to its right to do business in the state, a foreign corporation which has failed to comply with such requirements can maintain no action in such courts.⁴³ It is held that the New York statute providing that no foreign corporation shall do business in that state without having first obtained the certificate required by the act, and that no foreign corporation doing business in that state shall maintain any action upon it in that state unless, prior to the making of such contract, it shall have procured such certificate,⁴⁴ while it deprives a foreign corporation which has not

statute and did not pay such tax within thirty days after the tax was due should not maintain any action in a state court, it was held to be essential to the bar of the statute that it be shown that the tax had been fixed by the state officer charged with that function. *Seibert v. Dunn*, 70 N. Y. Misc. 422, 126 N. Y. Supp. 974.

⁴² *Swift & Co. v. Little*, 28 R. I. 108, 65 Atl. 615.

⁴³ *Peck-Hammond Co. v. Hamilton Independent School Dist.*, — Tex. Civ. App. —, 181 S. W. 697. See also *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22; *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969; *Delaware Ins. Co. v. Security Co.* (Tex. Civ. App.), 54 S. W. 916.

⁴⁴ The provision that the procuring of the certificate is a prerequisite to the making of a contract which shall be enforceable in the courts of New

York was added in 1901. *Laws N. Y. 1901*, p. 1327, c. 538. Prior to this addition to the statute, it was provided by statute that "no foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate." *Laws N. Y. 1892*, c. 687, § 15. See, for the construction of sec. 15 of the New York General Corporation Law, *Schwartzwaelder Co. v. Silverman*, 134 N. Y. Supp. 1114. Under this prior statute it was held that the contract became enforceable by the foreign corporation upon its compliance with the provisions of the statute. See *Simplex Dairy Co. v. Cole*, 86 Fed. 739; *Alleghany Co. v. Allen*, 69 N. J. L. 270, dismissed 196 U. S. 458, 49 L. Ed. 551; *Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043, aff'g 12 N. Y. Misc.

complied therewith of the right to maintain an action in New York on a contract entered into in that state, does not reach further and affect the suable quality of the contract in another state.⁴⁵ It is also held that such statute applies only to contracts made by the foreign corporation in the state and has no application to a contract made without the state,⁴⁶ or to a contract made by a third person, and by him assigned to the foreign corporation,⁴⁷ or to matters which do not arise out of contract.⁴⁸ A foreign corporation authorized to transact

26, 33 N. Y. Supp. 64; *Davis Provision Co. v. Fowler Bros.*, 20 N. Y. App. Div. 626, 47 N. Y. Supp. 205, *aff'd* 163 N. Y. 580, 57 N. E. 1108.

In holding that sec. 15 of N. Y. General Corporation Law does not prevent a foreign corporation from maintaining an action on an attachment bond, Allen, J., said: "It is to be observed that the provisions of section 15 of the General Corporation Law, relied upon, do not preclude a foreign corporation from maintaining an action upon all contracts, but that the prohibition relates only to contracts 'made by it' within the state. The undertaking upon which the plaintiffs sue was not made by them. It was made without their knowledge or consent, express or implied, and against their will. It was a contract made by the defendant for their benefit; and, as such, it is, of course, enforceable by them. *Little v. Banks*, 85 N. Y. 258. I do not think, therefore, that the undertaking is such a contract as is contemplated by the provisions of the statute. A correct construction of the statute can best be gained by having recourse to its object, which, evidently, is to prevent foreign corporations from making contracts here without first having obtained leave to do so and thereby rendered themselves amenable to the authority of the state government for the purpose of taxation and other governmental control, by leaving them without redress as to such contracts as they may make in defiance of the

statute. In other words, the state, by this statute gives them notice that if they make contracts here, without having subjected themselves to its authority, they do so at their peril, but I think that this is the limit of the penalty prescribed for a failure to observe the statute, and that it was not intended to thereby close the courts to a foreign corporation as to all contracts affecting it. *Mahar v. Harrington*, 204 N. Y. 231, 97 N. E. 587, 38 L. R. A. (N. S.) 210." Allen, J., in *Sterling Mfg. Co. v. National Surety Co.*, 94 N. Y. Misc. 604, 159 N. Y. Supp. 979.

⁴⁵ *Alleghany Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724, appeal dismissed 196 U. S. 458, 49 L. Ed. 551. See also *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 38 L. R. A. (N. S.) 210, 97 N. E. 587, answering certified question in 146 N. Y. App. Div. 955, 131 N. Y. Supp. 1127, and reversing order in 146 N. Y. App. Div. 756, 131 N. Y. Supp. 514, which modified 71 N. Y. Misc. 430, 128 N. Y. Supp. 620.

⁴⁶ *Onderdonk v. Peale, Peacock & Kerr*, 104 N. Y. App. Div. 195, 93 N. Y. Supp. 505; *Sterling Mfg. Co. v. National Surety Co.*, 94 N. Y. Misc. 604, 159 N. Y. Supp. 979; *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 N. Y. Misc. 1, 90 N. Y. Supp. 836. See also *Simplex Dairy Co. v. Cole*, 86 Fed. 739.

⁴⁷ *O'Reilly, Skelly & Fogarty Co. v. Greene*, 18 N. Y. Misc. 423, 41 N. Y. Supp. 1056.

⁴⁸ *Joseph Schlitz Brewing Co. v.*

business in the state at the time it institutes an action cannot maintain an action for an injunction to prevent the prosecution of a suit at law upon the ground that it is predicated upon a contract obtained by fraud, if such contract was made by such corporation in the state at a time when it had no power to make such a contract or to sue in the state on account of its noncompliance with the statutory requirements.⁴⁹

Under a statute providing that the failure of a foreign corporation to comply with the statutory requirements before doing business in the state shall not affect the validity of any contract with such corporation, but no action shall be maintained or recovery had in any of the courts of the state by such foreign corporation so long as it fails to comply with the statutory requirements, it is held that where a foreign corporation doing business in the state fails to so comply after having been given an opportunity to do so, an action brought by it will be dismissed.⁵⁰

If a foreign corporation is doing business in the state contrary to the statutes thereof regulating the right of foreign corporations to do

Ester, 157 N. Y. 714, 53 N. E. 1126, aff'g 86 Hun 22, 33 N. Y. Supp. 143. See also Ferkel v. Columbia Clay Works, 192 Fed. 119.

⁴⁹ *Erie & M. Ry. & Nav. Co. v. Central Ry. Equipment Co.*, 152 Ill. App. 278, in which case the court said: "It is difficult to perceive any legitimate distinction between maintaining a suit upon an equitable claim and a bill which seeks to establish such claim. The former is forbidden to an unlicensed foreign corporation by the statute; and the prohibition must be deemed to include the latter also. We are of the opinion that such is the meaning and effect of the statute. The language is broad and we think is open to no other construction, where as here the bill does 'not contravert' the defendant's legal right in the suit at law, but seeks to establish affirmatively 'a claim in respect of that right' to control the defendant in the exercise of that right. This is, we think, seeking to maintain a suit in equity upon an equitable claim; and where the complainant was an unlicensed foreign

corporation transacting business in this state in violation of the law at the time of the transactions upon which its equitable claim is based, is within the prohibition of the statute."

⁵⁰ *E. & G. Theatre Co. v. Greene*, 216 Mass. 171, 103 N. E. 301.

"That business transactions by a foreign corporation in Texas, which has not complied with the requirement of the statute, are not void, and that the only right in respect thereto which is denied by the statute is the right to resort to the courts of our state for their enforcement, and that, when denied relief in our courts upon such ground, the proper judgment is one of dismissal only, leaving it open for the corporation to resort to courts of other jurisdictions for relief, are questions that are clearly determined in the opinion of the Supreme Court in the case of *Smythe Co. v. Ft. Worth Glass & Sand Co.* (Sup.), 142 S. W. 1157." *James, C. J.*, in *New State Land Co. v. Wilson*, — Tex. Civ. App. —, 150 S. W. 253.

business therein and prohibiting the maintenance of an action in the courts of the state by a noncomplying foreign corporation, an undisclosed principal is not thereby precluded from maintaining an action upon a transaction effected by such foreign corporation acting as agent.⁵¹

§ 5946. Statutes providing that contracts made by noncomplying foreign corporations shall be absolutely void. Where a statute, as is sometimes the case, not only prohibits foreign corporations from doing business in the state without first complying with certain conditions, but also expressly declares that contracts made in the state by a foreign corporation, which has not complied with the conditions imposed, shall be void, the effect of a failure to comply with the statute is clear. All contracts made within the state which constitute the doing of business within the meaning of the statute are absolutely void, and no action can be maintained by the corporation thereon.⁵²

§ 5947. Statutes making contracts void in behalf of noncomplying corporation. The legislature of a state in prescribing certain conditions upon which a foreign corporation may do business in the state may provide that any contract made by a foreign corporation within the state before it shall have complied with the statutory require-

⁵¹ *Courier-Journal Job Printing Co. v. Anderson*, 159 Ill. App. 32.

⁵² *United States. Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838.

Alabama. *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341; *Hanchey v. Southern Building & Loan Ass'n*, 140 Ala. 245, 37 So. 272; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751.

Illinois. *Ryerson & Son v. Shaw*, 277 Ill. 524, 115 N. E. 650.

Michigan. *Despres, Bridges & Noel v. Zierleyn*, 163 Mich. 399, 128 N. W. 769; *Hoskins v. Rochester Savings & Loan Ass'n*, 133 Mich. 505, 95 N. W. 566; *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

Missouri. *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461; *United Shoe Machinery Co. v. Ram-*

lose, 231 Mo. 508, 132 S. W. 1133; *Bank of Louisville v. Young*, 37 Mo. 398; *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636.

Oklahoma. *Goodner Krumm Co. v. J. L. Owens Mfg. Co.*, 51 Okla. 376, 152 Pac. 86.

Wisconsin. *Indiana Road Mach. Co. v. Town of Lake*, 149 Wis. 541, 136 N. W. 178; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408; *Allen v. Milwaukee*, 128 Wis. 678, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392, 106 N. W. 1099; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

As to the effect of a statutory provision imposing a penalty for non-compliance, see § 5943, *supra*.

ments "shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them,"⁵³ Such a statute has been enacted in Wisconsin, and it has been held that the words "shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them," mean just what they say, and render the contract void and a nullity so far as the corporation or its assigns are concerned, and not simply voidable at the option of the other party to the contract.⁵⁴ This statute also renders void a contract entered into by a copartnership formed by a noncomplying corporation and an individual, and the individual partner cannot enforce any right in favor of the copartnership.⁵⁵ It does not prohibit the transaction of such business as constitutes interstate commerce nor extend to such property as is acquired, held, or disposed of in the state in carrying on interstate commerce nor to such contracts as relate to interstate commerce.⁵⁶

⁵³ *Allen v. Fulton*, 167 Wis. 352, 167 N. W. 429; *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.* 151 Wis. 555, 139 N. W. 393; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 120 S. W. 408; *Duluth Music Co. v. Clancey*, 139 Wis. 189, 131 Am. St. Rep. 1051, 120 N. W. 854; *Elwell v. Adder Mach. Co.*, 136 Wis. 82, 116 N. W. 882; *International Text-Book Co. v. Peterson*, 133 Wis. 302, 14 Ann. Cas. 965, 113 N. W. 730; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

⁵⁴ *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

For consideration of this statute, see *Sprout, Waldron & Co. v. Amery Mercantile Co.*, 162 Wis. 279, 156 N. W. 158; *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.*, 151 Wis. 555, 139 N. W. 393; *Indiana Road Mach. Co. v. Town of Lake*, 149 Wis. 541, 136 N. W. 178; *Wolf Co. v. Kutch*, 147 Wis. 209, 132 N. W. 981; *Independent Tug Line v. Lake Superior Lumber & Box Co.*, 146 Wis. 121, 131 N. W. 408; *Gianna v. Kelsey Realty Co.*, 145 Wis. 276, 33 L. R. A. (N. S.) 355, 140 Am. St. Rep. 1075, 129 N. W. 1080; *F. A. Patrick & Co. v. Deschamp*, 145 Wis. 224, 129 N. W. 1096; *Elwell v. Adder*

Mach. Co., 136 Wis. 82, 116 N. W. 882; *Allen v. Milwaukee*, 128 Wis. 678, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392, 106 N. W. 1099; *Chickering-Chase Bros. Co. v. White*, 127 Wis. 83, 106 N. W. 797; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801; *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888; *Beaser v. Barber Asphalt Paving Co.*, 120 Wis. 599, 98 N. W. 525; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940.

One who has subscribed for and received stock in a foreign corporation and has retained it for a number of years must be deemed to have acquiesced in the contract of subscription and it cannot be set up as a defense to an action to enforce his liability as a stockholder that the corporation had not complied at the time of his subscription, with the provisions of the statute authorizing it to do business in the state. *Allen v. Fulton*, 167 Wis. 352; 167 N. W. 429.

⁵⁵ *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 9 N. W. 904.

⁵⁶ *Sprout, Waldron & Co. v. Amery Mercantile Co.*, 162 Wis. 279, 156 N.

A similar provision was adopted in Florida in an act providing that "every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state" before such corporation shall have filed a copy of its charter or articles of incorporation in the secretary of state's office and have received a permit to do business in the state "shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."⁵⁷ It has been held that it was not the purpose and effect of this statute to render such contracts wholly void, but merely to render them unenforceable in the hands of the corporation or its assigns, though enforceable against it or them. Nor does it either expressly or by necessary implication declare that a negotiable promissory note, taken in the state, in a business transaction, by a foreign corporation before complying with the statute, shall be void in the hands of a bona fide holder for value and without notice of the transaction of which the note formed a part.⁵⁸ Such a note could not, however, be enforced where the indorsee took it with notice.⁵⁹

§ 5948. Statutes imposing a penalty, but validating contract. Sometimes a statute requiring foreign corporations to comply with certain conditions precedent to the right to do business in the state and imposing a penalty for failure to do so, expressly declares that such failure shall not affect the validity of any contract by or with the corporation; and under such a provision the failure of a foreign corporation to comply with the statute cannot be set up to defeat its action on a contract.⁶⁰ This statute has been construed as pro-

W. 158; *F. A. Patrick & Co. v. Deschamps*, 145 Wis. 224, 129 N. W. 1096; *Elwell v. Adder Mach. Co.*, 136 Wis. 82, 116 N. W. 882; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 115 N. W. 829; *Catlin & Powell Co. v. Schuppert*, 130 Wis. 642, 110 N. W. 818; *Greek-American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888.

See §§ 5762-5784, *supra*.

⁵⁷ *Commercial Nat. Bank v. Jordan*, 71 Fla. 566, 71 So. 760; *Campbell v. Daniel*, 68 Fla. 282, 67 So. 90; *Ulmer v. First Nat. Bank of St. Petersburg*, 61 Fla. 460, 55 So. 405, the last case holding that the statute was not invalid as interfering with interstate

commerce nor as impairing any constitutional rights of such corporations.

⁵⁸ *Commercial Nat. Bank v. Jordan*, 71 Fla. 566, 71 So. 760.

⁵⁹ *Ulmer v. First Nat. Bank of St. Petersburg*, 61 Fla. 460, 55 So. 405.

⁶⁰ *Dominion Fertilizer Co. v. White*, 115 Me. 1, 96 Atl. 1069; *C. B. Rogers & Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580. See *E. & G. Theatre Co. v. Greene*, 216 Mass. 171, 103 N. E. 301. See also, *Laws Florida 1915 C 6,876, No. 70, § 2*, providing that the failure of any foreign corporation to comply with the requirements of a statute imposing conditions precedent to its right to do business in the state shall not affect the validity of any contract

hibiting a noncomplying corporation from maintaining an action on, or for the breach of, a contract made in the course of its business until it has complied with the statute, but it is not intended to take away from a delinquent foreign corporation its remedies for wrongs committed against its property in the state, and consequently such a corporation may maintain trover for the conversion of its property in the state which has been attached as the property of another.⁶¹

§ 5949. Effect of statutes making contracts of foreign corporations with citizens void upon contract with other than citizen. It is held that the protection of the citizens of the state is the sole object of a statute providing that before any foreign corporation shall begin to carry on business in the state it shall do certain things and that in the event of its failure so to do, all its contracts with citizens of the state shall be void as to it and shall not be enforced in its favor in the courts, and that contracts between foreign corporations, or contracts made by such a foreign corporation and one not a citizen of the state, are not affected by the statute.⁶²

§ 5950. Effect of retaliatory statutes upon contracts. As has been stated elsewhere, in a number of states the legislatures have enacted statutes of a retaliatory nature for the purpose of putting foreign corporations under the same restrictions and burdens as are imposed by the states by which they were created upon corporations of the state enacting the statutes. The constitutionality and nature of such statutes have been elsewhere considered.⁶³ It is held in New Jersey, under such a statute, that if a foreign corporation not having complied with the laws of the state imposing conditions upon foreign corporations precedent to their right to do business in the state transacts business in the state and subsequently complies with the conditions imposed

with such corporation, but no action shall be maintained or recovery had in any of the courts of the state by any such corporation, or its successors or assigns, so long as such foreign corporation fails to comply with the provisions of the act.

It is held that under such a statute, the words, "such failure shall not affect the validity of any contract by or with such corporation" is expressive of the intent of the legislature to include contracts which arise by impli-

cation of law, as well as express contracts. *C. B. Rogers & Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580.

⁶¹ *Dominion Fertilizer Co. v. White*, 115 Me. 1, 96 Atl. 1069.

⁶² *Boyington v. Van Etten*, 62 Ark. 63, 35 S. W. 622; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350. See also *Verdigris River Land Co. v. Stanfield*, 25 Okla. 265, 105 Pac. 337.

⁶³ §§ 5759, 5910, *supra*.

prior to the commencement of a suit on a cause of action arising out of such transaction of business, it cannot maintain such action, if, by the laws of the state by which it was created, a suit could not be maintained under similar circumstances.⁶⁴

§ 5951. Doctrine that question of noncompliance can only be raised by the state. As will be seen elsewhere, some of the courts hold that statutes in reference to foreign corporations doing business in the state, which are prohibitory in form, but without penalty, and silent as to the consequences of noncompliance, do not make void contracts, conveyances and other transactions by a corporation which has not complied with the statute, though it is doing business in the state in contravention of such statute, but that the only effect of such statutes is to make the corporation subject to proceedings by the state to oust it from doing business in the state.⁶⁵ Such courts hold

⁶⁴ *Wolf v. Lancaster*, 70 N. J. L. 201, 56 Atl. 172.

See §§ 5759, 5910, *supra*.

⁶⁵ *United States*. *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317; *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64; *Iowa Lillovet Gold Min. Co. v. United States Fidelity & Guaranty Co.*, 146 Fed. 437; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.

Kansas. See *D. M. Osborne & Co. v. Schilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258; *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411.

Montana. *MacGinness v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

New Mexico. *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701.

North Carolina. *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123.

North Dakota. *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285; *United States Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W.

203; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

South Dakota. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706, 4 S. D. 237, 55 N. W. 931.

Utah. *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, *rev'g* 28 Utah 372, 79 Pac. 570.

Washington. *Latshaw v. Western Townsite Co.*, 91 Wash. 575, 158 Pac. 248.

It was held by a federal court sitting in Missouri that the state alone could complain of the fact that a foreign corporation was doing business in the state without having complied with the statutes in regard to foreign corporations. Amidon, J., saying: "The plaintiff cannot clothe itself in the panoply of the state as a shield for the fraud which it is seeking to accomplish." *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64.

In *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931, the court said: "In the case either of domestic or foreign corporations, the state names the conditions upon which it may transact business. It does it in its sovereign ca-

that the question of noncompliance by a foreign corporation with such a statute cannot be raised in a collateral proceeding, but only in a direct proceeding brought by the state for that purpose.⁶⁶ Thus where

capacity, as the conservator of the rights and best interests of its citizens. The state, which alone can name the conditions, can alone enforce their observance. The statute in this case is directed, not against the contract made or the act done, but against the party acting. The wrong done in disregarding the law is against the state, and not against the individual. It may have been to the advantage of the individual. Transacting business in the state without compliance with the statutory conditions is a usurpation of power by the corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it. This is the rule in respect to a domestic corporation, certainly where it is conceded there was legal authority for its creation. And if this is the rule in respect to domestic corporations, and the object and purpose of this law is as far as practicable to make the foreign corporation within the state as a domestic one, why should not the rule apply, leaving to the state, and not to an individual litigant, who may not even be a resident of the state, the election of insisting upon an entire compliance with the law, or a waiver of such compliance? We think it should * * *

See also §§ 5942-5945, *supra*.

⁶⁶ *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64; *In re Estate of King*, 186 Ill. App. 24, *aff'd sub nom. Central Inv. Co. v. Melick*, 267 Ill. 564, 103 N. E. 681; *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701; *Latshaw v. Western Townsite Co.*, 91 Wash. 575, 158 Pac. 248.

"Upon principles of comity, the corporations of one state are permitted to do business in another, unless it conflicts with the law, or unjustly interferes with the rights of the citizens of the state into which they come. Under such circumstances, no citizen of a state can enjoin a foreign corporation from pursuing its business. Until the state acts in its sovereign capacity, individual citizens cannot complain. The state must determine for itself when public good requires that its implied assent to the admission shall be withdrawn." *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

In holding that the question of the right of a duly-organized corporation to do business in the state without having complied with such a statute cannot be raised or determined collaterally, the Supreme Court of South Dakota held that transacting business in the state by such noncomplying foreign corporation is a usurpation of power by such corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it, and that a foreign corporation duly organized under the laws of another state, and publicly doing business in South Dakota, without having complied with such statutory requirements, is, until its authority is challenged by the state, a *de facto* corporation. *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931.

In a suit by the receiver of an insolvent foreign corporation brought on behalf of creditors to reach assets in the state, it was held that a director of the corporation, who was a defendant, could not defeat the proceeding on account of the fact that the cor-

a foreign corporation filed a bill to foreclose a mortgage, and it was contended that it had no standing in court because it had not complied with the laws of the territory, in that it had not filed a copy of its charter in the office of the secretary of the territory and had not designated an agent upon whom process might be served as required by the statute of the territory, which contained merely a prohibition against doing business in the territory before such acts were done, it was held that the point was not well taken, because it could not be raised in a collateral proceeding.⁶⁷ Under a statute in Kansas providing that a foreign corporation seeking to do business in the state shall make application to the charter board for permission to do so, requiring such corporations to file an annual statement of their condition and providing that no action shall be maintained or recovery had in any of the courts of the state by any corporation doing business in the state without first obtaining the certificate of the secretary of state that such statements have been properly made, it is held that the regulation of foreign corporations devolves upon the state, and a private individual is not allowed to interfere except in the single instance of a failure to file its annual statement, and then only to the extent of abating a suit against him until the required statement has been filed.⁶⁸ The right of a private individual to question the right

poration had unlawfully carried on business in the state without complying with the laws of the state, and that it did not lie in his mouth to assert the corporation's want of legal capacity so long as the state was not complaining of any infraction of its laws. *Williams v. Hintermeister*, 26 Fed. 889.

⁶⁷ *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701. Laughlin, J., said: "A stranger or third person cannot be heard to object to a foreign corporation doing business within the limits of this territory, on the ground that it has not complied with the statute which requires all corporations chartered under the laws of any other state or territory to file an authenticated copy of its charter, and of the laws of the state or territory granting the same, and a certificate designating upon whom process may be served,

before it can do business in the territory. This objection must come first from the territory, in a direct proceeding in quo warranto brought for that purpose. It cannot be raised in an action between individuals."

⁶⁸ *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1014, 2 Ann. Cas. 56, 76 Pac. 411. The court said: "The naked question therefore remains, are the contracts referred to now subject to cancellation because made before the book company was admitted to do business in this state? The question of capacity to contract is not involved on either side of the case. * * * There is here no lack of capability, no defect of power, and no deficiency of authority. The only question is if power may be effectually displayed as against the provisions of the corporation law. The statute describes itself as an act 'providing for the regulation of foreign corporations'

of a foreign corporation, not having complied with the statutory con-

and the method by which they may be permitted to do business in this state,' and it purports to cover that entire field. It prevents the exercise of corporate franchises in this state with respect to matters for which citizens of this state cannot incorporate, prevents concerns which are morally and financially irresponsible and untrustworthy from freely invading the state and imposing upon its citizens and subjects foreign companies to the jurisdiction of local authorities. Official supervision of these affairs is committed to a state board. Such affairs, however, relate to nothing but the character and condition of the corporation itself. They are all enumerated in the statements of the application for admission and in the annual reports. There is no intimation of any purpose whatever to interfere in the relations between the corporation and the citizen. Business between them is as unregulated as it is between natural persons. Nor does the statute, in terms, prohibit foreign corporations from doing business in this state, or avow any purpose to deny the people the benefit of commercial intercourse with them. Indeed, under its title the statute could not extend beyond regulation. It prescribes no penalty whatever for failure to obtain permission to do business here. It makes no reference whatever to any effect which such failure may have upon the title to property acquired, contracts made, or other incidents to the doing of business. It does not anywhere use the terms 'unlawful,' 'illegal,' or 'void,' or any equivalent for them, as applied to the transaction of business without authority. And it does not declare any determination whatever to reach beyond the offending company and nullify wholesome business bargains

in matters of lawful trade. Foreign corporations may be supervised, but business is not proscribed. This treatment of the subject did not follow, however, from any oversight on the part of the legislature with reference to the use of penalties. In the case of failure to file annual statements, the charter board is authorized to ascertain and summarily declare and publish a forfeiture of the right to do any further business, which forfeiture becomes immediately effective; and the right of any corporation doing business in the state to sue or recover in the courts is made to depend upon the ability to obtain a certificate of the secretary of state that section 12 of this law has been observed. The noteworthy feature of the last-mentioned provision is that it creates a field for the intervention of the citizen in the matter of corporate regulation. While contracts are not invalidated, the binding force of obligations impaired, or the doing of business forbidden, the citizen is allowed to interpose a bar to any relief until the proper certificate can be produced. From this survey of the statute, it appears that the legislature intended it to be complete; that the regulation of foreign corporations, and not the penalizing of business transactions, is its purpose; that such regulation is made the concern of the state in its special capacity as visitor, and not of any individual as a mere party to a contract; that a party to a contract is allowed to interfere in but a single instance, and then only to the extent of abating a suit against him; and that specific penalties are chosen to meet certain contingencies. The conclusion obviously and naturally follows that the legislature intended the state to rely upon the common-law remedies for the enforcement of the

ditions to acquire and hold real estate, is considered elsewhere.⁶⁹

§ 5952. Estoppel of persons dealing with foreign corporations to assert its noncompliance with statutes. Many of the courts have held that a person who deals with a foreign corporation and receives the benefit of the contract is estopped to set up, for the purpose of escaping liability, that the corporation had not complied with a statute imposing conditions precedent to its right to do business in the state.⁷⁰ Thus it is held in Iowa that a mortgagor who has received

statute where none other were expressed; that the courts have no authority to interpolate in the law provisions concerning which the legislature, with all the resources of the English language at its command, remained silent, or to annex penalties for a violation of the law which the legislature, with a great arsenal to choose from, failed to mention. Hence contracts made with a foreign corporation before it has obtained permission to do business in the state are not for that reason invalid or subject to cancellation."

⁶⁹ See § 5858, *supra*.

⁷⁰ United States. *Iowa Lillooet Gold Min. Co. v. United States Fidelity & Guaranty Co.*, 146 Fed. 437; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co.*, 68 Fed. 412; *American Loan & Trust Co. v. East & West R. Co.*, 37 Fed. 242. See *Turner Const. Co. v. Union Terminal Co.*, 229 Fed. 702, certiorari denied 241 U. S. 678, 60 L. Ed. 1233.

Arkansas. See *Dickey v. Southwestern Surety Ins. Co.*, 119 Ark. 12, Ann. Cas. 1917 B 634, 173 S. W. 398.

Georgia. *Ray v. Home & Foreign Investment & Agency Co.*, 98 Ga. 122, 26 S. E. 56.

Indiana. *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172.

Iowa. *Prudential Ins. Co. v. Cushman*, 130 Iowa 378, 106 N. W. 934; *Spinney v. Miller*, 114 Iowa 210, 89

Am. St. Rep. 351, 86 N. W. 317.

Nebraska. *J. K. Armsby Co. v. Raymond Bros. Clarke Co.*, 90 Neb. 553, 134 N. W. 174. See *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839.

New York. *Watts-Campbell Co. v. Yuengling*, 51 Hun 302, 3 N. Y. Supp. 869; *Mahar v. Harrington Park Villa Sites*, 71 Misc. 430, 128 N. Y. Supp. 620.

North Dakota. *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544.

Ohio. *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343.

Pennsylvania. *Kilgore v. Smith*, 122 Pa. St. 48, 15 Atl. 698; *Altoona Sanitary Milk Co. v. Armstrong*, 38 Pa. Super. Ct. 350; *Holmes Co. v. Barnard*, 15 Wkly. Notes Cas. 110.

South Dakota. *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.

Washington. *Rathbone, Sard & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298; *La France Fire-Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327.

In *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, it was said: "The offense of a failure to comply with the corporation law of the state of Kansas was an offense against the state, and not against the complainants in this suit. For that offense the state had

and retained the profits of the contract in pursuance of which the mortgage is made, cannot be heard to assert the invalidity of his mortgage on the ground that the mortgagee is a foreign corporation which has failed to comply with the statutes prescribing the conditions upon which a foreign corporation may do business in the state, the state alone being entitled to take advantage of the failure of the corporation to comply with the statute.⁷¹ And where a statute requires a foreign corporation doing business in the state to have a place of business and a registered authorized agent thereat in the state, and makes it a misdemeanor for any agent to do business in the state without having complied with the statute, and, under such statute, contracts made by a foreign corporation doing business in the state before establishing a place of business and registering an authorized agent are void, it is held that a person designated as its agent by a foreign corporation upon compliance by it with the provisions of such statutes, and who offered his resignation which was accepted, but did not take any steps to have his appointment as registered agent canceled or annulled, could not assert successfully that a contract entered into by him, after such resignation and its acceptance, with the corporation was illegal and void because the corporation had no authorized agent in the state at the time such contract was made.⁷²

ample remedy. It could prevent the maintenance of actions by this corporation in its courts. It could maintain a proceeding to oust it from its power to do business, and could enjoin it from carrying on business, within the state. The statutes of the state forbid the commission of many offenses, and make many requirements of individuals and of corporations. It is, however, ordinarily no defense to an action for the enforcement of a contract that the plaintiff has been guilty of larceny, burglary, or of the violation of other statutes of the state in which the suit is brought, and it is not perceived how the fact that a corporation has failed to comply with the laws authorizing it to do business in a state should constitute any valid reason why those who are under the obligations of fair contracts with it should be released from performing their agreements."

One, who, in dealing with a foreign

corporation, borrows its money, and secures the loan by a deed to realty containing a power of sale, is estopped from denying the right of such corporation to have this power conferred upon it, or to exercise the same when conferred. *Ray v. Home & Foreign Investment & Agency Co.*, 98 Ga. 122, 26 S. E. 56.

⁷¹ *Prudential Ins. Co. v. Cushman*, 130 Iowa 378, 106 N. W. 934; *Spinney v. Miller*, 114 Iowa 210, 89 Am. St. Rep. 351, 86 N. W. 317.

A purchaser of real estate from a foreign corporation cannot assert that it had no right under its charter to hold real estate, and consequently is unable to perform its contract of sale, for its incapacity in this respect can only be taken advantage of by the state. *McKinley-Lanning Loan & Trust Co. v. Gordon*, 113 Iowa 481, 85 N. W. 816, citing *Carlow v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. 873.

⁷² *De La Vergne Refrigerating*

This view, however, while it is supported by a number of cases, is not entertained by some courts, and does not seem to be in accord with the better reasoning. When the legislature, by a positive enactment, prohibits and makes it unlawful for foreign corporations to come into the state and engage in business without complying with certain prescribed conditions, it does so on the ground of public policy, and for the purpose of excluding them until they have complied with the conditions. To allow a foreign corporation to disregard the statute, and do business in violation of the prohibition, and to invoke the doctrine of equitable estoppel to enable it to enforce its illegal contracts, is to set the statutory prohibition at naught, and to make use of a doctrine based upon equitable principles to sustain and encourage violations of law. Many of the courts hold, therefore, that a person who contracts with a foreign corporation is not estopped, as against the corporation, in an action on the contract, to set up its failure to comply with a statute imposing conditions upon its right to do business in the state.⁷³ The doctrine of estoppel, it was said in a federal case, does not extend so far as to enable a person or corporation to do what is forbidden by law.⁷⁴ Thus, under a statute providing that no action shall be maintained or recovery had in any of the

Mach. Co. v. Kolischer, 214 Pa. 400, 63 Atl. 971.

⁷³ *United States*. *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *Cyclone Min. Co. v. Baker Light & Power Co.*, 165 Fed. 996; *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078.

Alabama. See *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 So. 961. Compare, however, *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

Idaho. See *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049.

Illinois. *Joseph T. Ryerson & Son v. Shaw*, 277 Ill. 524, 115 N. E. 650; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.*, 124 Ill. App. 174, aff'd 222 Ill. 199, 78 N. E. 567.

Kansas. *D. M. Osborne & Co. v. Shilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258.

Kentucky. *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 51 L. R. A. (N. S.) 293, Ann. Cas. 1915 C 565, 161 S. W. 570, overruling *Johnson v. Mason Lodge No. 33*, 1 I. O. O. F., 106 Ky. 838, 51 S. W. 620.

Massachusetts. *National Mut. Fire Ins. Co. v. Pursell*, 10 Allen 231; *Williams v. Cheney*, 3 Gray 215.

Minnesota. *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989.

Missouri. See *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461. Compare *Wulff v. Armstrong Cork Co.*, 250 Mo. 723, 157 S. W. 615.

Wisconsin. *Wisconsin Trust Co. v. Munday*, 168 N. W. 393; *Aetna Ins. Co. v. Harvey*, 11 Wis. 394.

⁷⁴ *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078. See also *Cyclone Min. Co. v. Baker Light & Power Co.*, 165 Fed. 996.

courts of the state by any foreign corporation doing business in the state without first obtaining the certificate of the secretary of state that the corporation has complied with the provisions of the statute, it is held that the fact that the defendants knew that the plaintiff was a foreign corporation at the time the contract in question was made does not estop him from pleading noncompliance by the foreign corporation with such statute.⁷⁵ Under a statute providing that every

⁷⁵ *D. M. Osborne & Co. v. Shilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258. The court said: "The fact that the defendants may have known that the plaintiff was a foreign corporation does not argue that they knew it was doing business in violation of law. Numerous corporations organized in other states are engaged in carrying on business in Kansas, and doing so legitimately. The statute provides how such corporations may legitimately conduct business within the state, and, as the conditions prescribed are not onerous, why should anyone assume that a corporation engaged in business in the state has not observed the statutory conditions. Besides, a corporation might have had authority when the contract was made, and, by subsequently failing to make the required annual statements, have lost its right to do business in Kansas or to maintain actions in the courts of the state. Another reason why the defendants are not estopped is that the statute was enacted for the benefit of the general public, and its purpose cannot be bargained away by individuals. The regulation of foreign corporations is for the purpose of subjecting them to inspection so that their condition, standing, and solvency may be known; the same sort of inspection to which domestic corporations are subjected. Another purpose likewise intended for the protection of the public was to subject foreign corporations to the jurisdiction of the courts of the state, and an incidental purpose was to provide revenue. In-

volved in the statute are the public considerations which are of greater consequence than mere individual rights. It is not for the defendants' sake, therefore, that the provision was made, but it is a rule of state policy of which the defendants may incidentally take advantage. The method of enforcing the regulation and protecting the public is contained in the provision that no action can be maintained or recovery had in the courts of the state until there has been a compliance with the statutory conditions. As was said in *State v. American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041: 'While contracts are not invalidated, the binding force of obligations impaired, or the doing of business forbidden, the state is allowed to impose a bar to any relief until the proper certificate can be produced.' "

Nor will the fact that the defendants set up a counterclaim in the answer, asking for damages resulting from the breach of the contract by the plaintiff operate as a waiver of their right to ask for an abatement of the action. *D. M. Osborne & Co. v. Shilling*, 74 Kan. 675, 11 Ann. Cas. 319, 88 Pac. 258.

The fact that one who has borrowed from a noncomplying foreign corporation has made numerous payments of interest instalments before being sued, and without objection on the ground of the noncompliance of the corporation, does not constitute a waiver of the right to plead the corporation's failure to comply with constitutional

contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state before it shall have complied with the provisions of the statute shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them, it is held that after a foreign corporation has complied with the requirements of the statute, a contract entered into by it prior to such compliance may be adopted by it and the other party thereto and it can acquire rights theretofore ineffectually undertaken to be contracted for by operation in its favor of an estoppel upon the party dealt with to deny the existence of such rights, or by joining with that party in adopting as the evidence of a subsisting contract between them the instrument which, when it was signed did not, because of the statutory prohibition, confer any enforceable right upon the corporation.⁷⁶ And although a contract made by a foreign corporation is void on account of its not having complied with statutory conditions precedent to its right to do business in the state, yet where the parties make a new contract, and the plaintiff can make out a case without any reliance upon the original contract, the new contract is valid and enforceable.⁷⁷ Notwithstanding a statutory provision that a foreign corporation doing business in the state without compliance with certain conditions precedent to its right to do business therein cannot maintain any action or suit, either legal or equitable, in any of the courts of the state upon any demand whether arising out of contract or tort, a foreign corporation, although doing business in the state without having complied with such conditions may maintain an action of assumpsit to recover advances made by it under a contract of sale which had been wrongfully rescinded by the vendor, even though the statutes of the state render void the contract under which the advances were made.⁷⁸

and statutory provisions. *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049.

One who has secured a loan from a noncomplying corporation and has failed to pay according to his contract will not be permitted in a court of equity to admit the contract and the indebtedness and at the same time prosecute his action to cancel the mortgage given to secure the indebtedness simply because the corporation failed to comply with the statute in

qualifying to do business. *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049.

⁷⁶ *Turner Const. Co. v. Union Terminal Co.*, 229 Fed. 702; *Montgomery Traction Co. v. Montgomery Light & Water Power Co.*, 229 Fed. 672.

⁷⁷ *Missouri Fidelity & Casualty Co. v. Art Metal Const. Co.*, 242 Fed. 630.

⁷⁸ *Laswell Land & Lumber Co. v. Lee Wilson & Co.*, 236 Fed. 322. The court said: "Defendant, as disclosed in the pleadings and indisputable facts

§ 5953. Effect of failure of foreign corporation to comply with statutes as against persons dealing with corporation. Statutes prohibiting foreign insurance companies and other corporations from doing business in the state until they have made a deposit of securities, or performed other conditions, are clearly intended for the protection of the citizens of the state who may deal with such corporations, and, if they do not in terms contain any prohibition against dealing with corporations which have not performed the conditions, they are not to be construed as preventing a citizen from maintaining an action against it on the contract. To hold otherwise would make the statute an instrument of fraud against those whom it is intended to protect.⁷⁹

found by the master and court below, advanced a large sum of money to plaintiff in a partial payment for lumber purchased from plaintiff pursuant to the terms of the void contract. Plaintiff, with this money in its possession, repudiated the contract, refusing to deliver the lumber to defendant, and converted the money to its own use. Every principle of justice and fair dealing requires that it should pay back this money to defendant; and this the law demands, notwithstanding the fact that the contract was void. One cannot make a shield of a void contract to rob an associate. Defendant's right of action, as asserted in its cross-bill does not spring from or rest upon the void contract. It does not invoke the contract for the assertion of its rights. It seeks recovery notwithstanding the contract. Its action is properly classified as one in assumpsit for money had and received by plaintiff to defendant's use."

79 United States. In re Taylor, 135 Fed. 206; Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co., 55 Fed. 27; Ehrman v. Teutonia Ins. Co., 1 Fed. 471; The Manistee, 5 Biss. 381, Fed. Cas. No. 9,027, aff'd 7 Biss. 35, Fed. Cas. No. 9,028.

Alabama. Alexander v. Alabama Western R. Co., 179 Ala. 480, 60 So. 295; Citizens' Nat. Bank v. Buckheit,

14 Ala. App. 511, 71 So. 82, certiorari denied Ex parte Buckheit, 196 Ala. 700, 72 So. 1019.

Arizona. Fleming v. Black Warrior Copper Co., Amalgamated, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

Florida. Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 So. 760.

Illinois. Joseph T. Ryerson & Son v. Shaw, 277 Ill. 524, 115 N. E. 650.

Iowa. Pennypacker v. Capitol Ins. Co., 80 Iowa 56, 8 L. R. A. 236, 20 Am. St. Rep. 395, 45 N. W. 408.

Michigan. Shower v. J. L. Owens Co., 158 Mich. 321, 133 Am. St. Rep. 376, 122 N. W. 640.

Missouri. See Central Coal & Coke Co. v. Optimo Lead & Zinc Co., 157 Mo. App. 720, 139 S. W. 525; Union Bank Note Co. v. Ajax Portland Cement Co., 155 Mo. App. 349, 137 S. W. 18; Young v. Gaus, 134 Mo. App. 166, 113 S. W. 735.

New York. Marshall v. Reading Fire Ins. Co., 78 Hun 83, 29 N. Y. Supp. 334.

Ohio. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St. 67.

Pennsylvania. Watertown Fire Ins. Co. v. Simons, 96 Pa. St. 520; Swan v. Watertown Fire Ins. Co., 96 Pa. St. 37; Hagerman v. Empire Slate Co., 97 Pa. 534; Hoge v. Dwelling-House Ins. Co., 138 Pa. St. 66, 20 Atl. 939.

Tennessee. Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228,

Thus, notwithstanding a foreign corporation has not complied with the statute requiring it to file a copy of its charter with the secretary of state, mortgages and debentures executed by it on property in the state are not void, but are enforceable against it.⁸⁰

§ 5954. Estoppel of foreign corporation to assert its noncompliance with statute. If the statute prohibiting foreign corporations from doing business in the state until it has performed certain prescribed conditions does not in terms contain any prohibition against citizens of the state dealing with foreign corporations which have not complied with the conditions, a foreign corporation, if it does business in a state and enters into contracts without having complied with the conditions imposed by the statute, will be estopped to set up its noncompliance for the purpose of escaping liability on its contracts, for it cannot thus take advantage of its own wrong.⁸¹ To per-

Ann. Cas. 1917 E 42, 183 S. W. 1019.

Texas. Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin, — Tex. Civ. App. —, 179 S. W. 541.

While a permit to do business in Texas might be a condition precedent to the right of a foreign corporation to file suit in Texas, it is not necessary for such a corporation to have a permit before it can incur liabilities, make contracts for services, and be sued in the state. Bankers' Trust Co. v. Cooper, Merrill & Lumpkin, — Tex. Civ. App. —, 179 S. W. 541; Home Forum Benefit Order of Illinois v. Jones, 20 Tex. Civ. App. 68, 48 S. W. 219; Western U. Tel. Co. v. Clark, 14 Tex. Civ. App. 563, 38 S. W. 225.

⁸⁰ Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, Ann. Cas. 1917 E 42, 183 S. W. 1019, holding the question to be settled at least by analogy by Louisville Property Co. v. Nashville, 114 Tenn. 213, 84 S. W. 810, in which it was held that where a foreign corporation acquires property in the state without complying with the statutory requirements, such acquisition is valid as against every one save the state.

⁸¹ United States. In re Naylor Mfg.

Co., 135 Fed. 206; Sparks v. National Masonic Acc. Ass'n, 73 Fed. 277; Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co., 55 Fed. 27; Berry v. Knight Templars' & Masons' Life Indemnity Co., 46 Fed. 439; Williams v. Hintermeister, 26 Fed. 889; Ehrman v. Teutonia Ins. Co., 1 Fed. 471.

Alabama. Alexander v. Alabama Western R. Co., 179 Ala. 480, 60 So. 295; Brooklyn Life Ins. Co. v. Bledsoe, 52 Ala. 538; Citizens' Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82, certiorari denied Ex parte Buckheit, 196 Ala. 700, 72 So. 1019.

Arizona. Fleming v. Black Warrior Copper Co., Amalgamated, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

Arkansas. Minneapolis F. & M. Ins. Co. v. Norman, — Ark. —, 85 S. W. 229; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350.

Florida. Commercial Nat. Bank v. Jordan, 71 Fla. 566, 71 So. 760.

Georgia. Ray v. Home & Foreign Investment & Agency Co., 98 Ga. 122, 26 S. E. 56.

Idaho. Katz v. Herrick, 12 Idaho 1, 86 Pac. 873.

Illinois. Watertown Fire Ins. Co. v.

mit a foreign corporation to so escape would be offensive to public policy.⁸²

Rust, 141 Ill. 85, 30 N. E. 772, aff'g 40 Ill. App. 119; **Ross v. New South Farm & Home Co.**, 191 Ill. App. 353.

Indiana. **Behler v. German Mut. Fire Ins. Co.**, 68 Ind. 347; **Barricklow v. Stewart**, 31 Ind. App. 446, 68 N. E. 316.

Iowa. **McKinley-Lanning Loan & Trust Co. v. Gordon**, 113 Iowa 481, 85 N. W. 816; **Green v. Equitable Mut. Life & Endowment Ass'n**, 105 Iowa 628, 75 N. W. 635; **Sparks v. National Masonic Acc. Ass'n**, 100 Iowa 458, 69 N. W. 678; **Pennypacker v. Capital Ins. Co.**, 80 Iowa 56, 8 L. R. A. 236, 20 Am. St. Rep. 395, 45 N. W. 408.

Kansas. **Germania Fire Ins. Co. v. Curran**, 8 Kan. 9.

Massachusetts. **Hartford Live Stock Ins. Co. v. Matthews**, 102 Mass. 221. See, however, **Claffin v. United States Credit System Co.**, 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; **Abraham v. Mutual Reserve Fund Life Ass'n**, 183 Mass. 116, 66 N. E. 605, holding that under the Massachusetts insurance act, a foreign corporation could defend on such ground.

Michigan. **Kuennan v. United States Fidelity & Guaranty Co.**, 159 Mich. 122, 123 N. W. 799; **Showen v. J. L. Owens Co.**, 158 Mich. 321, 133 Am. St. Rep. 376, 122 N. W. 640; **Rough v. Breitung**, 117 Mich. 48, 75 N. W. 147; **Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.**, 31 Mich. 346.

Minnesota. **Ganser v. Fireman's Fund Ins. Co.**, 34 Minn. 372, 25 N. W. 943.

Mississippi. **Williams v. Bank of Commerce of Memphis**, 71 Miss. 858, 12 Am. St. Rep. 503, 16 So. 238.

Missouri. **Parke, Davis & Co. v. Mullett**, 245 Mo. 168, 149 S. W. 461; **Central Coal & Coke Co. v. Optimo Lead & Zinc Co.**, 157 Mo. App. 720, 139 S. W. 525; **Union Bank Note Co.**

v. Ajax Portland Cement Co., 155 Mo. App. 349, 137 S. W. 18; **Young v. Gaus**, 134 Mo. App. 166, 113 S. W. 735.

Nebraska. See **Nebraska Power Co. v. Koenig**, 93 Neb. 68, 139 N. W. 839.

Nevada. **Evans v. Lee**, 11 Nev. 194.

New York. **Gaul v. Keil & Arthe Co.**, 199 N. Y. 472, 92 N. E. 1069, modifying judgment in 133 App. Div. 621, 118 N. Y. Supp. 225; **Franzen v. Zimmer**, 90 Hun 103, 35 N. Y. Supp. 612; **Marshall v. Reading Fire Ins. Co.**, 78 Hun 83, 29 N. Y. Supp. 334. See **Wolski v. Booth & Flinn**, 93 Misc. 651, 157 N. Y. Supp. 294.

North Carolina. **Fisher v. Traders' Mut. Life Ins. Co.**, 136 N. C. 217, 48 S. E. 667.

Ohio. **Newburg Petroleum Co. v. Weare**, 27 Ohio St. 343.

Pennsylvania. **Lasher v. Stimson**, 145 Pa. St. 30, 23 Atl. 552; **Hoge v. Dwelling-House Ins. Co.**, 138 Pa. St. 66, 20 Atl. 939; **Kilgore v. Smith**, 122 Pa. St. 48, 15 Atl. 698; **Hagerman v. Empire Slate Co.**, 97 Pa. St. 534; **Watertown Fire Ins. Co. v. Simons**, 96 Pa. St. 520; **Swan v. Watertown Fire Ins. Co.**, 96 Pa. St. 37.

Texas. **Home Forum Ben. Order v. Jones**, 20 Tex. Civ. App. 68, 48 S. W. 219. See **Bankers' Trust Co. v. Cooper**, **Merrill & Lumpkin**, — Tex. Civ. App. —, 179 S. W. 541.

Wisconsin. **Ashland Lumber Co. v. Detroit Salt Co.**, 114 Wis. 66, 89 N. W. 904.

⁸² **In re Naylor Mfg. Co.**, 135 Fed. 206; **Phenix Ins. Co. v. Pennsylvania R. Co.**, 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970; **Barricklow v. Stewart**, 31 Ind. App. 446, 68 N. E. 316; **Fisher v. Traders' Mut. Life Ins. Co.**, 136 N. C. 217, 48 S. E. 667.

Where a foreign insurance company has transacted business in the state, it will not be allowed to defend against

A trustee in bankruptcy of a foreign corporation doing business in a state cannot take advantage of the omission of the corporation to comply with the requirements of the statute prescribing conditions upon which foreign corporations may do business in the state, if the corporation is not permitted to do so.⁸³ Officers and stockholders of a foreign corporation doing business in the state in violation of a statute cannot make a negotiable promissory note to the corporation, and then, acting as officers and agents of the corporation assign the note to an innocent holder for value in the name of the corporation, and, when sued on the note, set up their own wrong and fraud as a defense thereto.⁸⁴ Judgment creditors of a foreign corporation being

a liability incurred by it in the state on the ground that it had not taken out a license to do business in the state, as required by law to do. *Fisher v. Trader's Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

"The doctrine that a foreign insurance company, which has insured the property of a citizen for an agreed compensation may, in case of loss, avoid payment on the ground that it has wrongfully omitted to comply with our statute upon the subject of foreign insurance companies, is so much at variance with all our preconceived notions of justice that we would not feel inclined to follow it. We think the decided weight of authority is against such a doctrine." *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970.

⁸³ *In re Naylor Mfg. Co.*, 135 Fed. 206, distinguishing *Swing v. Munson*, 191 Pa. St. 582, 58 L. R. A. 223, 71 Am. St. Rep. 772, 43 Atl. 342.

⁸⁴ *Young v. Gaus*, 134 Mo. App. 166, 113 S. W. 735. *Bland, P. J.*, said: "It would be a travesty upon justice and a reproach to the law of the state if, in these circumstances, the appellants could shelter themselves behind the unlawful act of the corporation; and thus indirectly set up their own wrong and fraud to escape a liability they voluntarily contracted. It has never been held in this state that a

foreign corporation, unlawfully doing business herein, by failing to comply with section 1025, supra, may set up its own wrong as a defense when sued by a citizen of the state, in the courts of this state, to recover an honest debt due him from the corporation. To hold that the statute was enacted for the purpose of enabling foreign corporations, unlawfully doing business in this state, to shelter themselves behind it for the purpose of evading their honest debts to citizens of this state, contracted in good faith, and in ignorance of the fact that the corporation was a foreign one, or, if foreign that it had failed to comply with the requirements of the statute, would be to stultify the legislature that enacted it. The legislature had no such purpose in view. One purpose of the statute is to bring revenue into the treasury of the state; the other is to protect citizens of the state dealing with foreign corporations by compelling them, as a condition to the right to do business in the state, to submit to the jurisdiction of the courts of the state."

See *Kuennan v. United States Fidelity & Guaranty Co.*, 159 Mich. 122, 123 N. W. 799, holding that where a foreign corporation is estopped to assert the invalidity of a contract entered into by it on account of its non-compliance with the statutory require-

its privies in the absence of fraud, when it is estopped to assert as against the mortgagee the invalidity of a mortgage executed by it, because the corporation had failed to comply with the statutory prerequisites to its right to do business in the state, they are likewise so estopped.⁸⁵

Where a foreign corporation is doing business in the state illegally, because it was organized for a purpose prohibited by the laws of the state, and consequently could not be licensed to do business therein, a contract between it and one of its officers which contemplated the performance by him of services in connection with such illegal business, is invalid.⁸⁶

§ 5955. Personal liability of agent or stockholders of noncomplying corporation to third persons. As will be seen elsewhere, some of the statutes imposing conditions upon foreign corporations doing business in the state provide that the agent shall be personally liable to a penalty where the corporation is doing business in the state and has not complied with the statute regulating its right to do business therein. Other statutes provide that the agent shall be personally liable on such contracts.⁸⁷

A person who assumes to act for a foreign corporation, which has not complied with statutory conditions precedent to the right to do business may become personally liable on contracts made by him.⁸⁸ Thus in a Pennsylvania case, under a statute providing that no foreign corporation shall do business in the state until it shall establish an office, appoint an agent, and file with the secretary of state certain statements, and that an agent who transacts business for a foreign

ments, such estoppel extends also to its indemnitor.

A foreign corporation which has not complied with a statute regulating the admission of foreign corporations to do business in the state, while, incapable under such statute of maintaining actions in the state, may nevertheless be lawfully sued in the state. *Hunter v. Finch & Co. v. Zenith Furnace Co.*, 146 Ill. App. 257, *aff'd* 245 Ill. 586, 92 N. E. 521.

⁸⁵ *Central Coal & Coke Co. v. Optimo Lead & Zinc Co.*, 157 Mo. App. 720, 139 S. W. 525.

⁸⁶ *Warren v. Inter State Realty Co.*, 192 Ill. App. 438.

⁸⁷ See § 5912, *supra*. See also *Cockburn v. Kinsley*, 25 Colo. App. 89, 135 Pac. 1112; *Wadsworth v. Equitable Trust Co.*, 153 N. Y. App. Div. 737, 138 N. Y. Supp. 842; *Hovey v. Eiswald*, 139 N. Y. App. Div. 433, 124 N. Y. Supp. 130; *Otto v. Franklin's, Inc.*, 90 N. Y. Misc. 311, 153 N. Y. Supp. 107.

⁸⁸ *Raff v. Isman*, 235 Pa. 347, 84 Atl. 352; *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552. See also *Von Cotzhausen v. Barker*, 154 Ky. 624, 157 S. W. 1093; *Booth v. Scott*, — Mo. —, 205 S. W. 633.

corporation, which is amenable to and has not complied with the provisions of the statute, shall be liable to fine and imprisonment, it was held that a person who assumed to represent a foreign corporation without complying with the statute, and who engaged labor and purchased goods for the corporation was personally liable therefor, if the person with whom he dealt did not know that the agent was acting for the foreign corporation, and that his liability was not measured by the penalty prescribed.⁸⁹ Under a statute making officers, agents and stockholders of foreign corporations doing business within

⁸⁹ *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552, distinguishing *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534. *McCollum, J.*, said: "It is clear that the company could not authorize him to do business for it in this state, and that he must be regarded as cognizant of its noncompliance with the terms prescribed by the statute, and of its consequent incapacity. When a person assumes to act for another, knowing that he is not authorized to do so, he becomes personally liable to the party with whom he deals for and on account of his alleged principal.

* * * A citizen of this state, who has a business transaction with another as agent of a foreign corporation, may rely on the representation of the agent as to his authority, without releasing him from his common-law liability as principal, if it turns out that his action was unauthorized. In other words, his failure to make search in the office of the secretary of the commonwealth, for the statement which the corporation ought to file there, will not enure to the benefit of the person who falsely pretended that he was a duly-constituted agent. We think that as the appellee acted without authority from the * * * company, and it was nonexistent as to Pennsylvania, he is clearly liable to the appellant for the work done and goods furnished on his order while professedly acting in its behalf. * * *

Nor do we discover any merit in the

appellee's contention that his liability is measured by the penalty prescribed. * * * The penalty is not in lieu of, but in addition to, his common-law responsibility to the person with whom he dealt. We are unable to detect anything in the conduct or knowledge of the appellant which estops him from asserting his claim against the appellee. The work was done and the goods were furnished by him in reliance on the appellee's representation that he was authorized to act for the * * * company. This representation was untrue, and he may properly look to the party who made it for the value of the work done and the goods furnished on the faith of it."

"Under a statute imposing a tax on the gross receipts of a foreign corporation engaged in the business of loaning money in the state upon mortgage or lien on property, and providing that where the business is conducted by an agent, such agent shall make a sworn statement of such gross receipts and shall be personally liable for the amount of such tax, it is held that it is competent for the legislature to require the agent to pay the taxes, and he may be compelled to do so by suit, and the liability of the agent was not imposed in the nature of a penalty for failure to return the sworn statement, but is the mode provided to collect the taxes. *State v. Sloss*, 83 Ala. 93, 3 So. 745.

the state without complying with the statutes thereof "liable on any and all contracts of such corporation * * * made within the state," officers, agents and stockholders of a noncomplying foreign corporation are liable on the implied contracts or obligations of the corporation to return everything which was received by the corporation under an express contract with it by a party who has rescinded the express contract.⁹⁰ Where, under a statute regulating the doing of business in the state by foreign corporations, a foreign corporation has no legal existence in the state as a corporation until it has complied with the statute, an incorporator of a foreign corporation which had not complied with the statutory requirements and had no right to make any contract or transact any business in the state, who is engaged in carrying the business of mining in the state and furnishing money therefor in the name of the corporation, is individually liable for torts committed in the carrying on of such business.⁹¹ A statute requiring a foreign corporation desiring to transact business in the state to obtain a permit from the secretary of state to do business in the state, and providing that no foreign corporation can maintain any suit in any of the courts of the state upon any demand, whether arising out of contract or tort, unless, at the time such contract was made or tort committed, the corporation had taken the steps requisite to procure such permit, does not render the stock-

⁹⁰ Chesley v. Soo Lignite Coal Co., 19 N. D. 18, 121 N. W. 73.

⁹¹ Rowden v. Daniell, 151 Mo. App. 15, 132 S. W. 23. See also, Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; National Lead Co. v. S. E. Grote Paint Store Co., 80 Mo. App. 247; Toomey v. Supreme Lodge Knights of Pythias, 74 Mo. App. 507.

In holding the promoters of a non-complying corporation liable as partners on its contracts, the court, in Booth v. Scott, — Mo. —, 205 S. W. 633, said: "We have already * * * pointed out that it has long been settled in this court that every business transaction and contract made in this state by a foreign corporation which has not been admitted to do business in this state is absolutely void. This

declaration stands upon the foundation that there is no corporation in this state until it has complied with the conditions of our statute which confers the corporate capacity within the limits of our governmental jurisdiction. There being no corporation, the persons assuming to transact business in this state in the corporate name are partners with respect to personal liability."

See, however, Tribble v. Halbert, 143 Mo. App. 524, 127 S. W. 618; Journal Co. v. Nelson, 133 Mo. App. 482, 113 S. W. 690, holding that in absence of fraud stockholders of a foreign corporation doing business in the state without having complied with the statutory requirements are not liable as partners upon its contracts.

As to the rights and liabilities of stockholders on failure to incorporate, see §§ 4280-4284, supra.

holders of a foreign corporation, doing business in the state without having taken the requisite steps to procure such permit, liable as partners.⁹² But it is held in Tennessee that under a statute requiring a foreign corporation before doing business in the state to file in the office of the secretary of state a copy of its charter and pay certain fees and a privilege tax, and providing that it shall be unlawful for any foreign corporation to do business, or attempt to do business, in the state without having complied with the statutory prerequisites and that a violation of the act shall subject the offender to a fine, stockholders of a foreign corporation which has not complied with the statutory requirements, but has attempted to do business in the state are liable as partners on contracts entered into by it in the state.⁹³

§ 5956. Effect of noncompliance on liability of agent to account to foreign corporation. One who acts as agent of a foreign corporation in doing business in a state without having complied with conditions precedent prescribed by statute is estopped, as against the corporation, to set up the failure of the corporation to comply with the statute in order to defeat an action by the corporation to recover money received by him in the course of his employment, or for an accounting.⁹⁴ It is well settled that while the courts will not enforce

⁹² *A. Leschen & Sons Rope Co. v. Moser*, — Tex. Civ. App. —, 159 S. W. 1018. See also *Tribble v. Halbert*, 143 Mo. App. 524, 127 S. W. 618; *Journal Co. v. Nelson*, 133 Mo. App. 482, 113 S. W. 690. See *National Bank of Wichita v. Spot Cash Coal Co.*, 98 Ark. 597, 136 S. W. 953, holding that where a foreign corporation does business in the state without having complied with statutory requirements precedent to its right to do business therein, its failure to comply does not have the effect of dissolving the corporation and rendering it in effect a partnership and its officers partners with respect to business transacted by the corporation in the state.

Where residents of Kansas procure a charter for a corporation in another state, but fail to comply with the provisions of Kansas Gen. St. §§ 1710-1726, respecting foreign corporations

doing business in Kansas, they are not personally liable for a judgment in an action of tort rendered against the corporation. *Beal v. Childress*, 92 Kan. 109, 139 Pac. 1198.

⁹³ *Cunningham v. Chelby*, 136 Tenn. 176, 188 S. W. 1147. See also § 4280 et seq., supra.

⁹⁴ *Alabama*. *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350, 34 So. 1012.

Indiana. *United States Exp. Co. v. Lucas*, 36 Ind. 361.

New York. *Penn Mut. Life Ins. Co. v. Bradley*, 66 Hun 635; 21 N. Y. Supp. 876, aff'd 142 N. Y. 660, 37 N. E. 569.

Pennsylvania. *In re Hovey's Estate*, 198 Pa. St. 385, 48 Atl. 311.

Tennessee. *Memphis & A. River Packet Co. v. Agnew*, 132 Tenn. 265, L. R. A. 1916 A 640, 177 S. W. 949.

In Memphis & A. River Packet Co. v. Agnew, 132 Tenn. 265, L. R. A.

an illegal contract, yet if a servant or an agent of another has, in the prosecution of an illegal enterprise for his master or principal, received money or other property belonging to the master or principal, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.⁹⁵ It is held, however, in one jurisdiction, that in an

1916 A 640, 177 S. W. 949, the court said: "There appear to be cases holding to this view and denying a non-complying foreign corporation the right to recover on a note of its agent executed for money received under the contract of agency, on the ground that: 'It would be to make the public policy of the state subsidiary to the propriety and policy of the rule of private law which forbids an agent to question the right of his principal to money collected by him for the principal. Such a rule ignores the broad and controlling rights of the public.' Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989; Benefit Society v. Lesser, 105 Mich. 716, 63 N. W. 977. But in State v. O'Brien, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252, this court said: 'Whatever others might say about the right of this foreign corporation to come into this state to carry on its business and acquire property interests without first having complied with the requirements of the act of 1891, at any rate the defendant's mouth is closed when, as agent, he receives the money of and for this corporation, and feloniously appropriates it to his own use. The wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. To him, under such circumstances, the rule of estoppel applies.' While State v. O'Brien was a criminal case, the court in the later civil case of Insurance Co. v. Kennedy, 96 Tenn. 711, 716, 36 S. W. 709, correctly, albeit as dictum, said in respect of such a defense by an agent of a noncomply-

ing foreign corporation that he would be concluded on the authority of the O'Brien Case. And the cases from several jurisdictions deny the defense to an agent in civil cases. Penn Mutual, etc., Co. v. Bradley, 21 N. Y. Supp. 876, 142 N. Y. 660, 37 N. E. 569; U. S. Express Co. v. Lucas, 36 Ind. 361; Walker v. Kremer, 29 Fed. Cas. No. 17,076; DeLaval Separator Co. v. Walworth, 13 Brit. Columbia, 295. And see Holleman v. Bradley Fertilizer Co., 106 Ga. 156, 32 S. E. 83, and note to Moss Mercantile Co. v. First Nat. Bank, 47 Ore. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, 8 Ann. Cas. 572. This accords with those rulings made in the analogous cases which involve an attempted defense upon the part of the agent that the fund in question was realized as the result of an illegal transaction, and where it is held not to be maintainable, that the money cannot be retained on the ground of the illegality of the original transaction, but that the law will raise an indebtedness in assumpsit as against the defendant."

⁹⁵ In re Hovey's Estate, 198 Pa. St. 385, 48 Atl. 311.

This principle is substantiated by many authorities. See Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. Ed. 732; Evans v. Inhabitants of Trenton, 24 N. J. L. 764; Smith v. Blachley, 188 Pa. St. 550, 68 Am. St. Rep. 887, 41 Atl. 619; Peters v. Grim, 149 Pa. St. 163, 34 Am. St. Rep. 599, 24 Atl. 192; Baldwin v. Potter, 46 Vt. 402. And see generally Mechem on Agency (2d Ed.), § 1332.

Thus in Pennsylvania under a stat-

action by a foreign corporation against its agent to recover money received by the agent for its use, the agent is not estopped to show that the corporation has not complied with certain conditions imposed by a statute of the state regulating the right of corporations to do business in the state, and providing that no corporation which shall fail to comply with such statutory requirements shall maintain any action in the courts of the state upon any demand, whether arising out of contract or tort.⁹⁶ Following the reasoning of this decision, it has also been held that where the statute provides that no foreign corporation can maintain any suit, legal or equitable, upon any demand arising either out of contract or tort unless it has complied with the requirements of the statute, a noncomplying corporation

ute making void contracts by a foreign corporation which does business in that state without compliance with the provisions of the statute, it was held that a foreign corporation, consigning goods to a commission merchant to be sold by him on commission, could recover from him moneys due to it from him for goods sold by him, even though such transactions between the agent and the corporation should be held to constitute the carrying on of business in the state by the foreign corporation, and it had failed to comply with the requirements of the statute. In *re Hovey's Estate*, 198 Pa. St. 385, 48 Atl. 311.

See *Verdigris River Land Co. v. Stanfield*, 25 Okla. 265, 105 Pac. 337.

⁹⁶ *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989. The court said: "The corporation must comply with the law, or the courts of the state are closed to it. The statute expresses a clearly defined public policy, and it is inconceivable that in the face of this prohibition a foreign corporation may, without complying with the statute, establish an agency within the state, proceed to transact business in violation of the statute, and, when its agent neglects to account for money received in the course of such business, bring an action in the state court

against the agent and be heard to assert that the agent cannot raise the question of the right of the corporation to maintain the action. This would be to make the public policy of the state subsidiary to the propriety and policy of a rule of private law which forbids an agent to question the right of his principal to money collected by him for the principal. Such a rule entirely ignores the broad and controlling rights of the public. * * * As far as the right to raise this question is concerned, it is immaterial whether the action is upon a promissory note, or to recover money received by an agent for the use of his principal. The doctrine of estoppel cannot be applied to enable a person or corporation to do what is forbidden by law. *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205, 68 N. W. 1065; In *re Comstock*, 3 Sawy. (U. S.) 218, Fed. Cas. No. 3,078; *Cincinnati, etc., Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626. The cases which hold that a defendant in a criminal prosecution, charged with embezzlement of money from a corporation, cannot assert the noncompliance of the corporation with the statutes as a defense, are manifestly inapplicable. A prosecution is brought by the state itself, and the right of the corporation to do business in the state is in no way involved."

cannot maintain an action against its agent in the state based upon the contract of agency.⁹⁷

§ 5957. Effect of noncompliance on right to sue on bonds of agent.

By the weight of authority, if a foreign corporation illegally engages in business in a state without complying with conditions prescribed by statute, it cannot maintain an action in the state against the sureties on the bonds of an agent employed by it in the transaction of such business.⁹⁸ Thus, under a statute requiring every foreign corporation undertaking to do business in the state to comply with certain prescribed conditions and providing that it shall not be lawful for any such corporation to do any business in the state until it has complied with such conditions and that any person or agent of such foreign corporation who shall transact any business in the state without compliance with the provisions of the statute shall be guilty of a misdemeanor, it is held that in a suit against the surety on a bond given by such agent to indemnify a foreign corporation against any loss which may be sustained by it on account of the dishonesty of the agent there can be no recovery against such surety, if the foreign corporation had not complied with the requirements of the statute.⁹⁹

⁹⁷ *Billingslea Grain Co. v. Howell*, — Tex. Civ. App. —, 205 S. W. 671.

⁹⁸ *McCanna & Fraser Co. v. Citizens Trust & Surety Co. of Philadelphia*, 76 Fed. 420, 35 L. R. A. 236, aff'g 74 Fed. 597; *United States Exp. Co. v. Lucas*, 36 Ind. 361; *Barney v. Daniels*, 32 Ind. 19; *Daniels v. Barney*, 22 Ind. 207; *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552; *Mutual Ben. Life Ins. Co. v. Bales*, 92 Pa. St. 352; *Thorne v. Travellers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89.

⁹⁹ *McCanna & Fraser Co. v. Citizens' Trust & Surety Co. of Philadelphia*, 76 Fed. 420, 35 L. R. A. 236 (aff'g 74 Fed. 597), *Butler, J.*, said: "In *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552, it is said: 'These terms are not onerous, or in conflict with any constitutional provision or rule of public policy. But they are clearly prohibitory, and they indelibly stamp as unlawful any business transactions, within the state, by a foreign

corporation which has not complied with them. It is only by its observance of them that it can have a legal existence for business purposes within this jurisdiction, or acquire contractual rights which our courts will recognize. *Thorne v. Insurance Co.*, 80 Pa. St. 15.' It will be observed that the court in its construction adopts the principles of the case of *Thorne v. Insurance Co.*, in which it was held that, when a foreign insurance company has not complied with the act under which it alone is authorized to transact business in Pennsylvania, there can be no recovery by the company upon a bond given by its agent, with sureties, conditioned for paying over moneys of the company received by him. *Johnson v. Hulings*, 103 Pa. St. 498, is to the same effect. Thus it results that the bond in suit must be regarded as taken to protect the plaintiff while engaged in prosecuting its business in violation of law.

There are, however, some decisions to the contrary.¹ Of course, the right of a foreign corporation to sue the sureties on a bond of its agent cannot be affected by a state statute, where the business done by it through the agent constituted interstate commerce.²

§ 5958. Effect of noncompliance with statute upon criminal liability of agent. An agent of a foreign corporation cannot defeat a criminal prosecution for the embezzlement of money or property of the corporation by setting up its failure to comply with statutory conditions precedent to the right to do business in the state.³

It is substantially a contract to protect the plaintiff against loss while engaged in violating the law. It requires no argument to demonstrate that such a contract is invalid. The point made by the plaintiff's counsel, that inasmuch as the appointment of the agent was lawful the bond taken as security for his conduct is not liable to the objection urged, is ingenious, but is not sound. The conduct contemplated relates to his prosecution of the unlawful business stated. It is true that the defendant may not have known or supposed that the business would be undertaken without compliance with the statute. It is immaterial, however, what the defendant's understanding was in this respect. It must be inferred that the plaintiff contemplated a disregard of the law from the beginning; inasmuch as he subsequently violated it. In any view that can be taken of the subject the fact remains that the plaintiff is seeking to enforce a contract entered into for the purpose of securing it in conducting a business forbidden by law; and such a contract is necessarily void."

¹ *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388; *Washington County Ins. Co. v. Colton*, 26 Conn. 42.

² *Gunn v. White Sew. Mach. Co.*, 57 Ark. 24, 18 L. R. A. 206 38 Am. St. Rep. 223, 20 S. W. 591. See §§ 5762-5784, *supra*.

³ *Indiana. State v. Turney*, 81 Ind. 559.

Michigan. *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736.

Minnesota. See *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989.

Tennessee. *State v. O'Brien*, 94 Tenn. 79, 26 L. R. A. 252, 28 S. W. 311.

Vermont. *State v. Hopkins*, 56 Vt. 250.

Where the agent of a foreign corporation was indicted for embezzling its funds and a plea was filed by the agent averring that the corporation had not complied with the statutory conditions precedent to its right to do business in the state, and consequently it was wrongfully carrying on business in the state, and could neither acquire, hold, collect, nor pay out money in the state, and, therefore, the defendant could not be liable for embezzling or appropriating the funds of the corporation, it was held that the plea presented no defense. The Supreme Court of Tennessee said: "The question then presented here is, is it a good plea? We have no hesitation in saying it is not. Conceding that this corporation (organized, as is avowed in the indictment, for benevolent purposes) is within the act of 1891 (and this we do not now determine), yet, if it should turn out in proof that the defendant, while acting as agent and employee of it, received money paid to him for his principal in the course of his employment, and then feloniously and fraudulently appropriated it to his

§ 5959. **Status of prohibited contract in other jurisdictions.** The status in another jurisdiction of a contract made in a state by a foreign corporation doing business therein without compliance with the laws of such state prohibiting foreign corporations from doing business therein unless it shall comply with certain prescribed conditions, depends upon the effect of such statute upon contracts so made. There are two settled rules which must be applied to the determination of the question whether such a contract will be enforced in another state: (1) A contract void by the law of the state where it is made, is void everywhere, and will not be enforced in another jurisdiction.⁴ (2) When the statute of the state where the contract is made does not expressly declare the contract to be void, and recourse must be had to interpretation to settle the question of its validity, the construction given to the statute by the courts of the state which enacted it will be adopted.⁵ If, therefore, a statute imposing restrictions upon foreign corporations doing business in the state provides that contracts made or acts done in the state before compliance by the corporation with certain conditions precedent to its right to do business therein, shall be void and unenforceable, such a contract will not be

own use, when indicted for the offense he cannot be permitted to defend himself from the criminal consequences of such wrongdoing upon the ground that his principal was carrying on its business in this state in violation of the terms of that act. Upon the plainest principles, having assumed to receive this money for his nonresident principal, he is concluded, both civilly and criminally, by this assumption. Whatever others might say about the right of this foreign corporation to come into this state and carry on its business and acquire property interests, without having first complied with the requirements of the act, * * *, at any rate the defendant's mouth is closed, when, as agent, he received the money of and for this corporation, and feloniously appropriated it to his own use. The wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. To him, under such circumstances, the rule

of estoppel applies." *State v. O'Brien*, 94 Tenn. 79, 26 L. R. A. 252, 28 S. W. 311.

It is not necessary for the prosecution to prove on the trial of an agent of an insurance company, indicted for larceny from it, that the corporation had complied with the statutory conditions precedent to its right to do business in the state. *State v. Hopkins*, 56 Vt. 250.

⁴ *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Hyde v. Goodnow*, 3 N. Y. 266; *Swing v. Wanamaker*, 139 N. Y. App. Div. 627, 124 N. Y. Supp. 231.

⁵ *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724; *Lane & Co. v. Watson*, 51 N. J. L. 186, 17 Atl. 117, aff'd 52 N. J. L. 550, 10 L. R. A. 784, 20 Atl. 894. See also *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 122 Minn. 266, 46 L. R. A. (N. S.) 697, 142 N. W. 305.

enforced in another jurisdiction.⁶ Even though such a statute does not expressly provide that the contract shall be void, if the courts of the enacting state have adjudged that a contract made by a foreign corporation in contravention of the statute of that state is void, the same effect will be given to it in another state.⁷ So, also, where the courts of the state by which such statute was enacted have determined what transactions constitute doing business in contravention of such statute, such construction will be followed in another jurisdiction in determining the question whether a foreign corporation was doing business in such state in contravention of such statute and the effect of such statute upon a contract made in that state.⁸ Thus where it is held by the courts of the state by which such a statute was enacted that isolated acts of business are not in violation of the statute, the same construction of such statute will be followed by the courts of another jurisdiction.⁹

The tendency of the courts in construing statutes forbidding the doing of business by foreign corporations in the state until they have complied with certain conditions precedent to the right to do business therein, when the statute does not declare the contract to be void, is to a strict construction maintaining the validity of the contract, and holding that the only effect of such legislation is to impose the prescribed penalties and the expressed disabilities.¹⁰ Consequently it is held by many courts, in considering the effect to be given to a statute of this character enacted in another state, that no greater latitude will be attached to it in another jurisdiction than that which is given in the enacting state.¹¹

⁶ *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.) 133, 99 Am. Dec. 663; *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. See also *Mahar v. Harrington Park Villa Sites*, 204 N. Y. 231, 38 L. R. A. (N. S.) 210, 97 N. E. 587, answering certified question in 146 N. Y. App. Div. 955, 131 N. Y. Supp. 1127, and reversing order in 146 N. Y. App. Div. 756, 131 N. Y. Supp. 514, 71 N. Y. Misc. 430, 128 N. Y. Supp. 620.

⁷ *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724; *Swing v. Wanamaker*, 139 N. Y. App. Div. 627, 124 N. Y. Supp. 231.

⁸ *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

⁹ *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

¹⁰ *Kirven v. Virginia-Carolina Chemical Co.*, 145 Fed. 288, 7 Ann. Cas. 219; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. See *Watkins v. Donnell*, 192 Mo. App. 640, 179 S. W. 980.

See also §§ 5942-5945, *supra*.

¹¹ *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 122 Minn. 266, 46 L. R. A. (N. S.) 697, 142 N. W. 305; *South Bay Co. v. Merrill*, 77 N. H. 1, 86 Atl. 351; *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. See *Watkins v. Donnell*, 192 Mo. App. 640, 179 S. W. 980.

However, disqualifications of a penal character have no extraterritorial operation, and comity does not require a recognition of them in other states.¹² And it is held in Illinois that the principle of comity in that state does not go so far as to preclude domestic corporations from maintaining in the state a suit against a corporation of another state in which such domestic corporation has done business without complying with the laws relating to foreign corporations, as the inability of the domestic corporation to sue in such foreign state does not affect the status thereof as to maintaining actions in the state of its creation.¹³

§ 5960. Application of statutes to contracts made in other states. Statutes forbidding the right to institute and maintain actions, except as a means of enforcing compliance by foreign corporations, are seldom, if ever, found in any state, and when used for this purpose

Thus in considering the effect to be given to a New York statute providing that no foreign corporation shall do business in that state without first having obtained the certificate required by the act, and that no foreign corporation doing any business in that state shall maintain an action in that state unless prior to the making of such contract it shall have procured such certificate, which had not been then construed by the courts of New York, the New Jersey court held that the only penalty prescribed by the New York act was a denial of the right to maintain an action in that state, and that such penalty did not attach to the contract so as to deprive it of a suable quality in the courts of New Jersey. *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724.

¹² *Allegheny Co. v. Allen*, 69 N. J. Eq. 270, 55 Atl. 724.

It was also held by a federal court sitting in Ohio that an Illinois statute providing that any foreign corporation doing business in that state without compliance with the conditions imposed by such statute shall be subject to a penalty and that no action may be maintained upon any claim by

such corporation in any court of the state did not prevent the enforcement in Ohio of a contract made in Illinois by a foreign corporation doing business there without compliance with such statutes. *Meador Furniture Co. v. Commercial Nat. Safe Deposit Co.*, 192 Fed. 616.

¹³ In *Hunter W. Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521, aff'g 146 Ill. App. 257, Cartwright, J., said: "However, we are referred to no case where it has been held that the courts of a state will turn a citizen away who has a good cause of action under its laws, because he could not maintain an action in another state."

A contract made in good faith and partly executed, which is not in its nature immoral, is not void because of the failure of one of the parties (an Illinois corporation) to comply with the statutes of the state where such contract was made, and to be performed which statutes pertain to foreign corporations doing business in such state of performance. *Hunter W. Finch & Co. v. Zenith Furnace Co.*, 146 Ill. App. 257, aff'd 245 Ill. 586, 92 N. E. 521.

they do not withhold from a corporation which has failed to comply with such conditions the right to sue for the enforcement of contracts made by them without the state.¹⁴ Thus under a statute providing

14 United States. Continental Trust Co. v. Tallassee Falls Mfg. Co., 222 Fed. 694; Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co., 183 Fed. 645.

Alabama. Vandiver v. American Can Co., 190 Ala. 352, 67 So. 299; Empire Clothing Co. v. Roberts, Johnson & Rand Shoe Co., — Ala. App. —, 75 So. 634; Covey Cotton Oil Co. v. Bank of Fort Gaines, — Ala. App. —, 74 So. 87; Citizens' Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82, certiorari denied Ex parte Buckheit, 196 Ala. 700, 72 So. 1019.

Arkansas. Hooker v. Southwestern Improvement Ass'n, 105 Ark. 99, 150 S. W. 398.

Idaho. Bettilyon Home Builders Co. v. Philbrick, 175 Pac. 958; Bonham Nat. Bank of Fairbury v. Grimes Pass Placer Min. Co., 18 Idaho 629, 111 Pac. 1078.

Missouri. International Text-Book Co. v. Gillespie, 229 Mo. 397, 129 S. W. 922; Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; Rialto Co. v. Miner, 183 Mo. App. 119, 166 S. W. 629. See also United Shoe Machinery Co. v. Ramlose, 231 Mo. 508, 132 S. W. 1133.

New Jersey. Hildreth Granite Co. v. Freeholders of Hudson County, 87 N. J. Eq. 316, 100 Atl. 158.

New York. Bremer v. Ring, 146 App. Div. 724, 131 N. Y. Supp. 487; Great Northern Moulding Co. v. Bone-wur, 128 App. Div. 831, 113 N. Y. Supp. 60; American Case & Register Co. v. Griswold, 68 Misc. 379, 125 N. Y. Supp. 4; International Text Book Co. v. Connelly, 67 Misc. 49, 124 N. Y. Supp. 603, aff'd 140 App. Div. 939, 125 N. Y. Supp. 1125; L. C. Page Co. v. Sherwood, 65 Misc. 543, 120 N. Y. Supp. 837.

Oklahoma. See Dr. Koch Vegetable Tea Co. v. Schumann, 42 Okla. 60, 139 Pac. 1133; Verdigris River Land Co. v. Stanfield, 25 Okla. 265, 105 Pac. 337.

Pennsylvania. See Dunbar Furnace Co. v. Pennsylvania R. Co., 237 Pa. 201, 85 Atl. 109.

Texas. Geiser Mfg. Co. v. Gray, 59 Tex. Civ. App. 617, 126 S. W. 610.

Washington. Lilly-Brackett Co. v. Sonneman, 50 Wash. 487, 97 Pac. 505.

West Virginia. Underwood Type-writer Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664.

Wisconsin. American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N. W. 1123; Catlin & Powell Co. v. Schuppert, 130 Wis. 642, 110 N. W. 818.

See also §§ 5913, 5935, supra, and §§ 5990-5999, infra. Compare, however, Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430.

"It is manifest that these regulations have no extraterritorial operation, and contracts made outside of this state, although they are to be performed in the state, are not within their influence so as to render them absolutely void in the making. Alexander v. Ala. Western R. Co., 179 Ala. 480, 60 South. 295." Citizens' Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82.

To deny a foreign corporation the right to invoke the jurisdiction and authority of the courts of the state in its behalf, the suit must be founded on a transaction of business in the state by the corporation without a compliance with the laws of the state. Empire Clothing Co. v. Roberts, Johnson & Rand Shoe Co., — Ala. App. —, 75 So. 634.

that every foreign corporation before it shall be authorized or permitted to transact any business in the state, or continue business therein if already established, or to sue or maintain any action in the courts of the state, should have and maintain an office in the state, and appoint an agent for the service of process, and file such appointment, it was held that a foreign corporation, which had never done any business in the state, was not required, as a condition precedent to maintaining an action in a court of such state based upon a contract made in another state, to comply with the terms of the statute, as it was not intended to prohibit foreign corporations, not doing business in the state by which it was enacted, from maintaining actions or interposing defenses in the courts of the state founded upon contracts made in another jurisdiction, but the statute referred and was intended to apply solely to foreign corporations doing business within the state, and that the legislature did not intend by such statute to abrogate the right to sue in the state which is granted to foreign corporations as a matter of comity between the states.¹⁵ And under a statute providing that until a foreign corporation transacting business in the state shall have complied with the conditions prescribed by the statute as precedent to its right to do business in the state, it shall not maintain any action in the state upon any contract made by it therein, it is held that the legislature did not intend to include the maintenance of suits in the business it forbade to be transacted, and that by expressly prohibiting the maintenance of suits on contracts made in the state, it impliedly permitted suits on contracts made elsewhere, and hence a foreign corporation may maintain suits in such state on contracts made outside of the state without complying with the conditions prescribed by the statute.¹⁶ In like manner, a statute providing that no foreign corporation can maintain any suit or action, either legal or equitable, in any of the courts of the state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had complied with the requirements of the statute by filing a copy of its charter, paying certain fees, and securing a permit to do business in the state, is held not to apply to a suit brought by a foreign corporation on a transaction which has occurred in another state.¹⁷

¹⁵ *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507.

J. L. 214, 54 Atl. 247; *M. B. Faxon Co. v. Lovett Co.*, 60 N. J. L. 128, 36 Atl.

¹⁶ *MacMillan Co. v. Stewart*, 69 N. J. L. 676, 56 Atl. 1132, aff'g 69 N. J. L. 212, 54 Atl. 240; *Slaytor-Jennings Co. v. Specialty Paper Box Co.*, 69 N.

692.

¹⁷ *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22, rev'g *Delaware Ins. Co. v. Security Co.*, —

Where, however, a contract, although entered into by a foreign corporation in another state, is to be performed in the state and in the performance of the contract the foreign corporation must engage in business in the state, it must comply with the statutory conditions precedent to its right to do business therein before it can enforce the contract.¹⁸

In an action by a foreign corporation, where it was not alleged in the complaint or answer, nor shown by the proof admitted or that excluded that the contract sued upon was made in the state or in the course of business done therein, it was held that the court properly refused to instruct the jury that the plaintiff could not recover unless it had complied with the provisions of the statute prescribing the terms upon which foreign corporations might do business in the state, as the contract in question might have been made in another state, and in the absence of evidence to the contrary, it would be presumed that such was the case.¹⁹

Tex. Civ. App. —, 54 S. W. 916, and quoting with approval *Sullivan v. Sheehan*, 89 Fed. 247. See *Western Supply & Manufacturing Co. v. United States & M. Trust Co.*, 41 Tex. Civ. App. 478, 96 S. W. 986; *Commercial Tel. Co. v. Territorial Bank & Trust Co.*, 38 Tex. Civ. App. 192, 86 S. W. 66. See § 5959.

¹⁸ *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341.

In *Citizens' Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82, Brown, J., said: "Where the contract is to be performed in this state, although not entered into here, and in the performance the nonresident corporation must engage in business in this state, although the contract is valid, the policy of the state, as evidenced by the Constitution and statutes, compels the courts of the state to refuse their aid to such offending corporation in the enforcement of such contract or recovering the benefits accruing thereunder."

¹⁹ *White River Lumber Co. v. Southwestern Improvement Ass'n*, 55 Ark. 625, 18 S. W. 1055, following *St. Louis*,

A. & T. Ry. Co. v. Fire Ass'n of Philadelphia, 55 Ark. 163, 18 S. W. 43. The court said: "The law affords no relief upon contracts made against its prohibition; but relief is withheld, not because the plaintiff has done illegal acts, but because the cause of action is a part of or connected with them. Although the plaintiff may have violated provisions of the law in particular transactions, it does not refuse relief upon a contract not connected with or a part of the prohibited acts. So, if the plaintiff did business in this state contrary to the law, and in connection therewith made a contract, no recovery could be had upon that contract; but, notwithstanding such illegal business, if the plaintiff made an independent contract abroad, a recovery thereon would not be defeated by the disconnected prohibited acts here. Now, it is not alleged in the complaint or answer, nor shown by the proof admitted or that excluded, that the contract sued on was made in this state, or in the course of business done here. For aught that appears, it may have been made in a foreign state, in the course of a business lawfully done

§ 5961. Effect of noncompliance upon contracts made before enactment of statute. Pursuant to the well-established rule that "even in the absence of constitutional obstacles to retroaction, a construction giving a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute, taken by themselves, and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all questions as to such intention,"²⁰ statutes imposing conditions upon foreign corporations doing business in a state are generally held not intended to be retroactive in their operation and not to affect the rights of the corporation under contracts made by it, with the express or implied consent of the state, prior to the enactment of the statute. To construe the statute as applying to existing contracts would render it unconstitutional as impairing the obligation of contracts.²¹ Thus a statute requiring, among

there, and, in the absence of a showing, the law will not imply facts disclosing the illegality of the contract. If it was lawfully made abroad, there is nothing in the laws of this state to preclude a recovery upon it in our courts. The prohibition relied upon is against doing business here, and not against doing business abroad that relates to property here; and the making of a lease abroad, and taking an obligation for the rent, 'is not doing business here, within that prohibition, although the demised premises are in this state. The law was designed to regulate corporations that come within the state to transact business with its citizens, and not such as might be found and dealt with abroad, in the latter case, the dealing is tested by the law of the place where it is had.'"

²⁰ Endlich on the Construction of Statutes, § 271, quoted with approval in *Fisher v. Green*, 142 Ill. 80, 31 N. E. 172, and in *Richardson v. United States Mortgage & Trust Co.*, 89 Ill. App. 670, aff'd 194 Ill. 259, 62 N. E. 606, where it was held that a statute providing that foreign corporations

doing business in the state shall have a public office or place in the state at which to transact its business, file a copy of its charter in the office of the secretary of state, pay fees therefor, etc., and that no foreign corporation which shall fail to comply with the act can maintain any suit or action either legal or equitable, in any of the courts of the state upon any demand, whether arising out of contract or tort, had no application to and, did not prevent an action to foreclose a mortgage executed to such corporation prior to the enactment of the statute.

²¹ **United States.** *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978, rev'g 34 Colo. 240, 82 Pac. 531; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838; *In re Conecuh Pine Lumber & Manufacturing Co.*, 180 Fed. 249. See also *Montgomery Light & Water Power Co. v. Montgomery Traction Co.*, 219 Fed. 963, aff'd 229 Fed. 672; *Fidelity Trust Co. v. Washington-Oregon Corporation*, 217 Fed. 588. *Arkansas. Sidway v. Harris*, 66 Ark.

other things, that a foreign corporation doing business in the state

387, 50 S. W. 1002, 58 Ark. 117, 23 S. W. 648; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350.

California. Black v. Vermont Marble Co., 1 Cal. App. 718, 82 Pac. 1060.

Colorado. Kirby v. Union Pac. Ry. Co., 51 Colo. 509, Ann. Cas. 1913 B 461, 119 Pac. 1042; Edward Malley Co. v. Londoner, 41 Colo. 436, 93 Pac. 488; Stone v. Victor Elec. Co., 36 Colo. 370, 85 Pac. 327.

Delaware. Standard Sew. Mach. Co. v. Frame, 2 Pennw. 430, 48 Atl. 188.

Idaho. Tarr v. Western Loan & Savings Co., 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049. See also War Eagle Consol. Min. Co. v. Dickie, 14 Idaho 534, 94 Pac. 1034; Katz v. Herrick, 12 Idaho 1, 86 Pac. 873.

Illinois. Richardson v. United States Mortgage & Trust Co., 194 Ill. 259, 62 N. E. 606; De Witt v. Flint & Walling Mfg. Co., 132 Ill. App. 356. See also Rudolph Wurlitzer Co. v. Dickinson, 153 Ill. App. 36, aff'd 247 Ill. 27, 93 N. E. 132.

Indiana. United States Savings & Loan Co. v. First Methodist Protestant Church, 153 Ind. 702, 55 N. E. 743; National Home Building & Loan Ass'n v. Black, 153 Ind. 701, 55 N. E. 743; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753.

Kentucky. Com. v. Mobile & O. R. Co., 123 Ky. L. Rep. 784, 54 L. R. A. 916, 64 S. W. 451.

Michigan. See Daniels v. Detroit, G. H. & M. R. Co., 163 Mich. 468, 476, 128 N. W. 797, 801; Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399, 128 N. W. 769.

Minnesota. Keystone Mfg. Co. v. Howe, 89 Minn. 256, 94 N. W. 723.

Mississippi. Saxony Mills v. Wagner, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas.

199, 49 So. 899. See Power v. Calvert Mortg. Co., 112 Miss. 319, 73 So. 51.

Nebraska. American Building & Loan Ass'n v. Rainbolt, 48 Neb. 434, 67 N. W. 493.

New Jersey. M. B. Faxon Co. v. Lovett Co., 60 N. J. L. 128, 36 Atl. 692.

New York. Lewis Pub. Co. v. Lenz, 86 App. Div. 451, 83 N. Y. Supp. 841; Atlantic Const. Co. v. Kreusler, 40 App. Div. 268, 57 N. Y. Supp. 983; Providence Steam & Gas Pipe Co. v. Connell, 86 Hun 319, 33 N. Y. Supp. 482; Johnston v. Mutual Reserve Ins. Co., 43 Misc. 251, 87 N. Y. Supp. 438, aff'd 45 Misc. 316, 90 N. Y. Supp. 539; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360.

North Carolina. Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 59 S. E. 123.

Pennsylvania. Com. v. Danville Bessemer Co., 207 Pa. 302, 56 Atl. 871.

Rhode Island. MacLeod v. G. P. Putnam's Sons, 24 R. I. 500, 53 Atl. 867.

South Carolina. British-American Mortg. Co. v. Jones, 76 S. C. 218, 56 S. E. 983.

Tennessee. Pioneer Savings & Loan Co. v. Cannon, 96 Tenn. 599, 33 L. R. A. 112, 54 Am. St. Rep. 858, 36 S. W. 386. See Stonega Coke & Coal Co. v. Southern Steel Co., 123 Tenn. 428, 31 L. R. A. (N. S.) 278, 131 S. W. 988.

Texas. Texas Land & Mortgage Co. v. Worsham, 76 Tex. 556, 13 S. W. 384; Whitley v. General Elec. Co., 18 Tex. Civ. App. 674, 45 S. W. 959; Middlebrook v. David Bradley Mfg. Co. (Tex. Civ. App.), 27 S. W. 169.

Washington. See Realty Co. v. Apolonio, 5 Wash. 437, 32 Pac. 219.

West Virginia. Billmyer Lumber Co. v. Merchants' Coal Co., 66 W. Va. 696, 26 L. R. A. (N. S.) 1101, 66 S. E.

should file certain documents in the office of the secretary of state, and pay certain taxes and fees and procure a permit to do business in the state, and prohibiting it from prosecuting or defending any action in the courts of the state, until it performed such acts and procured such certificate, was held not applicable to a sale of a machine made prior to the enactment of such a statute, and not to affect the suit brought for the purchase price thereof.²² And a statute providing that it shall be unlawful for a foreign corporation to do a building and loan business in that state until it shall have complied with certain requirements was held to apply to new contracts and not to be applicable to a contract which contemplated the lapse of several years before all of its terms should be carried out, the court holding that if the contract was valid when executed, it must be

1073; *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664.

Wisconsin. *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940. See *Bennington County Sav. Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

See §§ 5757, 5945, *supra*.

In construing a statute providing that no foreign corporation "shall carry on within this state the business for which it was incorporated, or enforce in the courts of this state any contract made in this state, unless it shall have complied with the following sections of this chapter," it was said: "The general principle is well established that a statute will not be construed to have a retroactive application unless its language to that effect is clear. The statute here in question has no language which indicates any such intention on the part of the legislature. It prohibits certain classes of corporations from engaging in the future in business in this state. It further denies such corporations the use of the courts of this state for the enforcement of contracts. It does not assume to avoid contracts already made." *MacLeod v. G. P. Putnam's Sons*, 24 R. I. 500, 53 Atl. 887.

"It has been uniformly decided elsewhere that a statute making it unlawful for foreign corporations to do business in a state without first complying with its requirements has no application to contracts of such corporation made before the enactment of the law. * * * The reason for this rule is perfectly plain. A law which expressly or by implication, takes away, abolishes, diminishes, suspends, or destroys the obligation of a contract, by repealing or abolishing the remedy thereon, is a clear invasion of constitutional law." *Collins, J., in Keystone Mfg. Co. v. Howe*, 89 Minn. 256, 94 N. W. 723.

It is held in Kansas under a statute providing that a foreign corporation before doing business in the state shall obtain a permit from the charter board, that after a foreign corporation has complied with the law and received permission to do business in the state, it cannot be enjoined, at the suit of the state, from performing contracts made before such permission was obtained. *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411.

²² *Stone v. Victor Elec. Co.*, 36 Colo. 370, 85 Pac. 327.

held to remain valid and enforceable to the end, no matter what changes the law might have undergone in the lifetime of the contract, and that to make the statute constitutional it must read prospectively.²³ Under a statute providing that from and after its passage, foreign corporations whose principal office or chief place of business should be located in the state, or which should have any part of their capital actually employed wholly within the state should pay a bonus tax upon the amount of their capital actually employed or to be employed wholly within the state and a like bonus upon each subsequent increase of capital so employed, it was held that the statute had no application to a foreign corporation already doing business in the state for which privilege it had already done all that the state had asked, and that the statute affected only those foreign corporations which after its passage, should locate their chief place of business or actually employ any part of their capital wholly within the state.²⁴ Where under the statutes of a state a foreign corporation, upon filing the proper papers and paying the statutory fees, and obtaining the certificate to that effect from the secretary of state, obtained the right to enter and do business in the state, and under the laws of the state the right to enter the state and do business therein as a corporation subject to the liabilities, restrictions and duties which were or might thereafter be imposed upon domestic corporations of like character, amounted to a contract to that effect, it was held that a statute imposing an annual tax or license fee double the amount which was imposed upon or enacted from a domestic corporation, impaired the obligation of the contract existing between the corporation and the state, and was therefore void as to the corporation.²⁵ A statute providing that no foreign corporation

²³ United States Savings & Loan Co. v. First Methodist Protestant Church, 153 Ind. 702, 55 N. E. 743; National Home Building & Loan Ass'n v. Black, 153 Ind. 701, 55 N. E. 743; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753. See Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 47 L. Ed. 328, in which Security Savings & Loan Ass'n v. Elbert, supra, is referred to.

²⁴ Com. v. Danville Bessemer Co., 207 Pa. 302, 56 Atl. 871.

²⁵ American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 393, 9 Ann. Cas. 978, rev'g 34

Colo. 240, 82 Pac. 531. Mr. Justice Peckham said: "These provisions of law, existing when the corporation applied for leave to enter the state, made the payment required, and received its permit, amounted to a contract that the foreign corporation so permitted to come in the state and do business therein, while subjected to all, should not be subjected to any greater, liabilities, restrictions, or duties than then were or thereafter might be imposed upon domestic corporations of like character. A provision in a statute of this nature subjecting a foreign corporation to all

failing to comply with its provisions shall maintain any suit, legal or equitable, in the courts of the state upon any demand arising out of contract or tort, has no application to suits to enforce contracts made by such corporations before the passage of the act.²⁶

The Supreme Court of the United States in construing a statute prohibiting foreign corporations from transacting business in the state until they should have filed a copy of their charter with the secretary of state and constituted him its attorney for the service

the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation, upon coming in the state, should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words, the liabilities, restrictions, and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions, and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come in the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, cor-

poration at the same time and to the same extent. Such being the contract, how long was it to last? Only until the state chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the only limitation imposed is the term for which the corporation would have the right to continue in the state as a corporation. One of the restrictions as to domestic corporations is that which limits their corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450, 72 Pac. 1067. Counsel for the state concedes that the corporation was admitted for a period of twenty years, but subject to the power of the state to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute. This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation."

See also *Kirby v. Union Pac. Ry. Co.*, 51 Colo. 509, Ann. Cas. 1913 B 461, 119 Pac. 1046; *Rudolph Wurlitzer Co. v. Dickinson*, 153 Ill. App. 36, aff'd 247 Ill. 27, 93 N. E. 132.

²⁶ *Richardson v. United States Mortgage & Trust Co.*, 89 Ill. App. 670, aff'd 194 Ill. 259, 62 N. E. 606.

of process, and providing that failure by the corporation to comply with the statute should subject it to a fine and that every contract made by a corporation affecting the personal liability or relating to property within the state before compliance should be wholly void on its behalf, but should be enforceable by it, and that such statute should not go into effect until a certain time after its passage, held that the statute was not retroactive with regard to business done in pursuance of an executory contract entered into after the passage of such statute, but before it went into effect.²⁷

As is seen elsewhere, when a foreign corporation has unlawfully engaged in business in a state without complying with statutory requirements, the legislature may waive and cure the illegality by statute, and render such contracts valid. Such statutes are termed "curative statutes" and are constitutional.²⁸

§ 5962. Effect of curative statutes. When a foreign corporation has unlawfully engaged in business in a state and made contracts or done acts therein without complying with statutory requirements, the legislature may waive and cure the illegality by statute and render the contracts or acts valid, and such legislation is not unconstitutional.²⁹ Where a statute legalizes every contract of a foreign corporation which had not complied with the laws of the state, but

²⁷ *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838. Mr. Justice Field said: "A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. The suggestion needing discussion is whether the statute impairs the obligation of the contract. We are of opinion that it is not open to that objection. * * * The suspension clause of § 4978 was of immediate operation, and therefore was notice to the plaintiff and the defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that; if

nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution of the Wisconsin law. Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all."

²⁸ See § 5757, *supra*, and § 5962, *infra*.

²⁹ *United States. West Side Belt R. Co. v. Pittsburgh Const. Co.*, 219

which, subsequently, though prior to the passage of the act, had complied and had paid all the taxes which would have accrued to the state if it had complied with the laws at the time of beginning business, contracts of a foreign corporation, which had been adjudged to be invalid prior to the passage of such act, are embraced within the purview of such statute, and become valid and enforceable.³⁰

U. S. 92, 55 L. Ed. 107. 227 Pa. 90, 75 Atl. 1029; *Utter v. Franklin*, 172 U. S. 416, 43 L. Ed. 498; *Gross v. United States Mortg. Co.*, 108 U. S. 477, 27 L. Ed. 795, aff'g 93 Ill. 483; *Randall v. Kreiger*, 23 Wall. 137, 23 L. Ed. 124; *Watson v. Mercer*, 8 Pet. 88, 8 L. Ed. 876; *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. Ed. 458; *In re Conecuh Pine Lumber & Manufacturing Co.*, 180 Fed. 249; *Caesar v. Capell*, 83 Fed. 403.

Idaho. *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873.

Illinois. *United States Mortg. Co. v. Gross*, 93 Ill. 483, aff'd 108 U. S. 477, 27 L. Ed. 795.

Minnesota. *Jenkins v. Union Sav. Ass'n*, 132 Minn. 19, 155 N. W. 765.

Montana. *Mutual Ben. Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446.

Tennessee. *Law Guarantee & Trust Co. v. Jones*, 103 Tenn. 245, 58 S. W. 219; *Illinois Building & Loan Ass'n v. Walker*, 42 S. W. 191; *Skillern v. Continental Ins. Co.*, 42 S. W. 180.

Wisconsin. See *Bennington County Sav. Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408.

See also § 5865, *supra*.

³⁰ *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 219 U. S. 92, 55 L. Ed. 107, aff'g 227 Pa. 90, 75 Atl. 1029.

It was held in Tennessee that a statute providing that contracts of a foreign corporation which had engaged in business in the state, made contracts or purchased property therein after the passage of a statute imposing con-

ditions upon foreign corporations doing business in the state without complying with the provisions of such statute, should be valid and enforceable if the foreign corporation should comply with certain prescribed conditions, and further providing that no mortgage or deed of trust on realty in the state, executed to a foreign corporation or to a trustee to secure indebtedness to a foreign corporation when such foreign corporation had not complied with the laws of the state at the time such mortgage or deed of trust was executed, should be foreclosed until two years after the passage of the act and that in settlements made under the statute not more than six per cent on the amount actually received should be collected, applied to pending suits. It was urged that while so much of the statute as enabled a complainant to foreclose the mortgage was valid, that portion of it which postponed the time for foreclosure and limited the amount of recovery was unconstitutional, but the court held that the statute, being a curative act, was constitutional, and that the state, in giving the contract rights validity or renewed vitality, had the right to impose such terms as it thought proper, and the complainant could not accept part only of the act. It was held that the court should stay such pending cases until the expiration of two years provided for in the act. *Illinois Building & Loan Ass'n v. Walker* (Tenn. Ch. App.), 42 S. W. 191, aff'd orally by the Supreme Court of Tennessee. Neil, J., said: "The next question is, do such

If under the statutes in force when an action was commenced by a foreign corporation it could not legally institute or maintain the same on account of its noncompliance with the requirements of such statute, the subsequent repeal of such statute without any saving clause does not improve or change the status of the plaintiff.³¹

§ 5963. Effect of contracts by noncomplying corporation having been executed. If a contract by a foreign corporation which was illegal because the corporation had failed to comply with conditions precedent to the right to do business, or because it was prohibited altogether from doing business, has been fully executed, the courts will not relieve either party from the effects of the contract.³² It

statutes apply to pending suits, and does this one? * * * Upon this subject Judge Cooley holds the following language: 'Nor is it important, in any of the cases to which we have referred, that the legislative act which cures an irregularity, defect, or want of original authority was passed after suit was brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision, and his case must be determined upon the law as it stands, not when the suit was brought, but when the judgment is rendered. It has been held that a statute allowing amendments to indictments in criminal cases might constitutionally be applied to pending suits; and even in those states in which retrospective laws are forbidden, a case must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced. And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered.' Cooley, Const. Lim. (5th Ed.) pp. 470, 471; *Butler v. Ass'n*, 97 Tenn. 679, 37 S. W. 385.'

³¹ *Oil, Paint & Drug Pub. Co. v. Stroud*, 156 Ill. App. 312.

³² **United States.** *Kawin & Co. v. American Colortype Co.*, 243 Fed. 317; *Continental Trust Co. v. Tallassee Falls Mfg. Co.*, 222 Fed. 694; *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *In re Conecuh Pine Lumber & Manufacturing Co.*, 180 Fed. 249.

Alabama. *Western U. Tel. Co. v. Louisville & N. R. Co.*, 81 So. 44; *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71; *George M. Muller Mfg. Co. v. First Nat. Bank of Dothan*, 176 Ala. 229, 57 So. 762; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 So. 961; *Hardison v. Plummer*, 152 Ala. 619, 44 So. 591; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751; *Kindred v. New England Mortgage Security Co.*, 116 Ala. 192, 23 So. 56; *Shahan v. Tethero*, 114 Ala. 404, 21 So. 951; *Russell v. Jones*, 101 Ala. 261, 13 So. 145; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424; *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; *Sherwood v. Avis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307; *Peters v. Brunswick-Balke-Collender Co.*, 6 Ala. App. 507, 60 So. 431.

Kentucky. See *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

Missouri. See *Handlin-Buck Mfg. Co. v. Wendelkin Const. Co.*, 124 Mo.

has been held, therefore, that although a mortgage executed to a foreign corporation to secure a loan made by it may have been originally invalid or unenforceable because of its failure to comply with the statute relating to foreign corporations, yet, where the contract evidenced by the mortgage has been fully executed by a foreclosure sale and conveyance to the purchaser, the mortgagor could not afterwards avail himself of the objection to recover the property or otherwise attack the transaction.³³ The same rule was applied in case of a chattel mortgage which had been foreclosed and hence was no longer executory, where the purchaser's title was attacked on the ground that the mortgagee was a foreign corporation which had not complied with the requirements of the statutes imposing conditions upon foreign corporations doing business in the state and providing that all contracts made in the state by a foreign corporation doing business shall at the option of the other party to the contract be wholly void.³⁴ And where the agent of a foreign insurance company advanced money for a person in payment of premiums on a policy issued by the company, and the assured gave the agent his note for the money so advanced, he could not defeat the action on the note by setting up the fact that the company had not complied with the law and had no

App. 349, 101 S. W. 702.

Utah. *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g 28 Utah 372, 79 Pac. 570.

Vermont. *Roberts v. W. H. Hughes Co.*, 86 Vt. 76, 83 Atl. 807.

See also § 5757, *supra*, and see also § 1559 *et seq.*, *supra*.

The Supreme Court of Utah in recognizing the distinction between the application of statutes regulating the right of foreign corporations to do business in the state to executed and executory contracts, said: "Where, as here, the contract itself being innocent and concerning a subject-matter itself harmless and lawful, and being fully executed upon the part of the corporation, and the consideration thereof retained by the citizen, he will not now be heard to defend against its enforcement, and be permitted to nullify his just obligation with re-

spect to it, solely upon the plea of noncompliance of the corporation with the enabling statute." *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g 28 Utah 372, 79 Pac. 570. See, however, dissenting opinion of Bartch, C. J.

³³ *Continental Trust Co. v. Tallassee Falls Mfg. Co.*, 222 Fed. 694; *Hardison v. Plummer*, 152 Ala. 619, 44 So. 591, citing *A. J. Cranor Co. v. Miller*, 147 Ala. 268, 41 So. 678; *Kindred v. New England Mortgage Security Co.*, 116 Ala. 192, 23 So. 56; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200.

³⁴ *Hardison v. Plummer*, 152 Ala. 619, 44 So. 591; *Electric Lighting Co. of Mobile v. Rust*, 117 Ala. 680, 23 So. 751; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424; *Sherwood v. Avis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307.

authority to do business in the state.³⁵ Where a contract of sale entered into by a foreign corporation is performed by the delivery of property by the vendor, such vendor will not be permitted to have the sale set aside by the reason of the failure of the corporation to have complied with the foreign corporation act of the state.³⁶ It is also held that where both parties to an executed contract of sale entered into in the state assert the validity thereof, the contract will not be deemed void as to a third party, although one of the parties to the contract was a foreign corporation which had not complied with the conditions precedent to its right to do business in the state.³⁷

§ 5964. Effect of noncompliance upon negotiable instruments executed to foreign corporation. If a negotiable note, bond or other instrument is given to a foreign corporation in a transaction which is illegal because of the corporation's failure to comply with the conditions precedent to the right to do business in the state prescribed by statute, the illegality may be set up as against a holder of the note or bond or other negotiable instrument who has not paid value or who purchased with notice.³⁸ By the weight of authority, the

³⁵ *Russell v. Jones*, 101 Ala. 261, 13 So. 145. See §§ 5952, 5953, *supra*.

³⁶ *A. J. Cranor Co. v. Miller*, 147 Ala. 268, 41 So. 678.

A purchase money mortgage to a person as trustee for a foreign corporation which has not complied with the laws of Alabama regulating the right of foreign corporations to do business in the state is enforceable. *Drew v. Fort Payne Co.*, 186 Ala. 285, 65 So. 71.

³⁷ *Handlin-Buck Mfg. Co. v. Wendelkin Const. Co.*, 124 Mo. App. 349, 101 S. W. 702. See also *Wulff v. Armstrong Cork Co.*, 250 Mo. 723, 157 S. W. 615.

³⁸ *Colorado*. See *McMann v. Walker*, 31 Colo. 261, 72 Pac. 1055.

Florida. See *Ulmer v. First Nat. Bank*, 61 Fla. 460, 55 So. 405, 61 Fla. 469, 55 So. 408.

Idaho. *Dietrich v. Copeland Lumber Co.*, 28 Idaho 312, 154 Pac. 626; *Katz v. Herrick*, 12 Idaho 1, 86 Pac.

873, quoting with approval *Clark & Marshall, Private Corp.* § 847h.

Massachusetts. *Roche v. Ladd*, 1 Allen 436; *Williams v. Cheney*, 8 Gray 206.

Mississippi. *Quartette Music Co. v. Haygood*, 108 Miss. 755, 67 So. 211.

Missouri. See *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461; *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086.

Oregon. See *Hirschfeld v. McCullagh*, 64 Ore. 502, 127 Pac. 541, *aff'd* on rehearing in 130 Pac. 1131.

Tennessee. *First Nat. Bank of Massillon v. Coughron* (Tenn. Ch. App.), 52 S. W. 1112.

It is held in Idaho that where the indorsee of a nonnegotiable promissory note sues the maker thereof, and the defendant sets up as one of his defenses that the payee was a foreign corporation doing business in the state without complying with the provisions of the Constitution and statutes of the

illegality of the instrument on this account may not be set up as against a bona fide purchaser for value and without notice.³⁹ Under a statute providing that every contract made by a foreign corpora-

state requiring the designation of an agent upon whom service of process could be made, and the filing copies of its articles of incorporation, it is error for the court to strike such defense from the defendant's answer. *Union Stockyards Nat. Bank of South Omaha v. Bolan*, 14 Idaho 87, 125 Am. St. Rep. 146, 93 Pac. 508.

Where a solicitor for a foreign insurance company doing business in a state without having first complied with the requirements of the constitution and statutes of such state took a promissory note from a citizen of such state in payment of premium on a policy of life insurance issued in favor of the maker, and thereafter such solicitor assigned such note to a person who was at all times mentioned agent and manager for such foreign corporation, and such agent advanced to the solicitor the amount of his commission, and the solicitor agreed to repay the agent in case the maker of the note failed to pay the same, it was held that the agent was not an innocent purchaser of the note for value. *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873.

That the Oklahoma statute (Wilson's Rev. & Ann. St., Okla. 1903, §§ 1225, 1227) does not render void in the payee's hands a note given in aid of the construction of a railroad by a foreign corporation, though the corporation has not complied with the requirements of the statute, see *Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139, 99 Pac. 785.

³⁹ *United States. Love v. Export Storage Co.*, 143 Fed. 1; *Hamilton v. Fowler*, 99 Fed. 18; *Lauter v. Jarvis-Conklin Mortgage Trust Co.*, 85 Fed. 894; *Press Co. v. City Bank*, 58 Fed. 321, aff'g *City Bank of Hartford v.*

Press Co., 56 Fed. 260; *Farmers Nat. Bank of Valparaiso, Indiana v. Sutton Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595.

Colorado. *McMann v. Walker*, 31 Colo. 261, 72 Pac. 1055.

Florida. *Commercial Nat. Bank v. Jordan*, 71 Fla. 566, 71 So. 760.

Idaho. *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873, quoting with approval *Clark & Marshall, Private Corp.* § 847h.

Indiana. *Zink v. Dick*, 1 Ind. App. 269, 27 N. E. 622.

Iowa. *Cook v. Weirman*, 51 Iowa 561, 2 N. W. 386.

Kansas. *Northwest Thrasher Co. v. Riggs*, 75 Kan. 518, 89 Pac. 921.

Massachusetts. *Roche v. Ladd*, 1 Allen 436; *Cazet v. Field*, 9 Gray 329; *Jones v. Smith*, 3 Gray 500; *Williams v. Cheney*, 3 Gray 215.

Michigan. *Vinton v. Peck*, 14 Mich. 287.

Mississippi. *Hart v. Livermore Foundry & Machine Co.*, 72 Miss. 809, 17 So. 769.

Missouri. See *Young v. Gaus*, 134 Mo. App. 166, 113 S. W. 735, explaining *Ehrhardt v. Robertson Bros.*, 78 Mo. App. 404. See also *Parke-Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461, and *Blevins v. Fairley*, 71 Mo. App. 259, where it was held under such statute that in order to defeat an action on a note to a foreign corporation on the ground that it had not complied with the statute, it must be shown that at the time of the execution of the note it was not a resident institution of the state. Compare *German-American Bank v. Smith*, — Mo. App. —, 208 S. W. 878.

New Hampshire. *State Capital Bank v. Thompson*, 42 N. H. 369.

New York. *Lindheim v. Sitt*, 33 Misc. 62, 68 N. Y. Supp. 145; *Vallett v. Parker*, 6 Wend. 615.

tion doing business in the state without compliance with certain prescribed conditions shall be wholly void on behalf of such corporation and its assigns, it is held that the word "assigns" does not include the indorsee of negotiable paper who takes the same before maturity,

North Dakota. *National Bank of Commerce v. Pick*, 13 N. D. 74, 99 N. W. 63.

Vermont. See *Converse v. Foster*, 32 Vt. 828.

In *Williams v. Cheney*, 3 Gray (Mass.) 215, a note executed to a foreign insurance company, engaged in doing business within the state in violation of statute prohibiting the doing of business until qualification under the law was held valid in the hands of a bona fide holder, although the payee could have maintained no action thereon.

In *Hamilton v. Fowler*, 99 Fed. 18, the court said: "The purchaser, before maturity, of this note had a right to assume that this note was what it purported to be, a Missouri contract, and was, therefore, unaffected by any law of Tennessee prohibiting the Missouri payee from doing business in Tennessee without first complying with the Tennessee law. This is the appearance which the makers of the note gave to the transaction on its face; and they should not be heard to deny that appearance as against one who became a holder for value, before maturity, and without notice. The Tennessee statute does not declare that negotiable notes made in the course of a business carried on in Tennessee in violation of the statute shall be void in the hands of a bona fide holder for value, without notice of its illegality. In the case of *Lauter v. Trust Co.*, decided by this court, and reported in 54 U. S. App. 49-51, 29 C. C. A. 473, 85 Fed. 894, we had to consider the attitude of an indorsee of a negotiable note made for money loaned in Tennessee by this same mortgage

company while engaged in carrying on business in that state without compliance with the statute requiring foreign corporations to register their charters. The note there in question purported to have been made at Kansas City, Mo., and was there made payable. It was secured by a mortgage upon lands in Tennessee. The indorsee of the note acquired it before maturity, for value, and without notice that the note was made in the conduct of a business carried on in Tennessee contrary to the prohibition of the statute. A decree enforcing the mortgage was affirmed. In that case we said: "The general and well-settled rule in favor of negotiable paper is that an innocent purchaser for value, before maturity, is unaffected by the fact that the consideration was illegal, and the note void and unenforceable by one having notice of the facts. If the illegality of the consideration results from a statute merely prohibiting a business or imposing a penalty, but does not declare a note or bill based upon such a prohibited transaction absolutely null and void, a bona fide holder of such paper will be protected."

"Facts occurring subsequent to the time the notes were given, conceding that they constituted a doing of business in the state in violation of the statutes, would not render the original contract void in the making so as to destroy the right of a holder in due course, for value, without notice. *Bozeman v. Allen*, 48 Ala. 512; *Alexander v. Alabama Western R. Co.*, 179 Ala. 480, 60 So. 295." *Citizens Nat. Bank v. Buckheit*, 14 Ala. App. 511, 71 So. 82.

for value, and without notice of defenses thereto, and that a negotiable note, void in the hands of the payee because it is a foreign corporation doing business in the state without having complied with such statute, may be enforced by a bona fide purchaser and indorsee for value before maturity, without notice of the facts rendering it void in the hands of the payee.⁴⁰ Warehouse receipts issued by a foreign corporation which has failed to comply with the statute may be good in the hands of a bona fide pledgee.⁴¹ It was held, however, in Tennessee, that a note which was executed in the state by a resident thereof to a foreign corporation which had not complied with the laws of the state prescribing the terms on which the foreign corporation might do business therein, and which grew out of and was a part of a business transaction had in the state by the foreign corporation, was void and uncollectible, even in the hands of an innocent purchaser for value, without notice.⁴²

Where a statute provides that no foreign corporation shall transact any business in the state without having first procured a permit from the secretary of state authorizing it to do business in the state, and that all contracts, engagements, undertakings or agreements with, by or to such corporation, made without obtaining such permit, shall be null and void, a note given to a foreign corporation for a consideration arising out of business transacted by it in the state without having procured such permit is absolutely void and unenforceable not only by the corporation, but even by a bona fide purchaser for value without notice.⁴³

⁴⁰ National Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63.

⁴¹ Love v. Export Storage Co., 143 Fed. 1.

⁴² First Nat. Bank of Massillon v. Coughron (Tenn. Ch. App.), 52 S. W. 1112. See, however, Lacy & McGhee v. Sugarman, 12 Heisk. (Tenn.) 354.

The federal courts held in Tennessee announced a different rule in Hamilton v. Fowler, 99 Fed. 18; Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. 894. And see Root v. Godard, 3 McLean 102, Fed. Cas. No. 12,037.

⁴³ Jones v. Martin, — Ala. App. —, 74 So. 761.

"If a contract entered into in violation of a statute is expressly declared void by the statute, the con-

tract is void, even in the hands of an innocent purchaser in due course.

* * * On the other hand, if the contract is not declared void by the statute and is subject to the law merchant, although it may not confer any right on the offending party, it will be protected in the hands of an innocent purchaser for value in due course and without notice." Citizens' Nat. Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82. But a note given to a foreign corporation which did not have a known place of business and a designated agent as required by Const. Ala. 1901, § 232, and Code Ala. 1907, §§ 3642-3646 cannot be enforced by the corporation, but it may be enforced by a bona fide purchaser for

The maker of notes given a noncomplying corporation is estopped to set up the invalidity of the notes on the ground of such noncompliance where, after the corporation had complied, the maker ratified the notes by making payments thereon and by securing extensions of time.⁴⁴

Where a note, secured by a bond, upon which a foreign corporation sues is only remotely connected with the alleged unlawful transaction of business by it in the state and rests upon a new and independent consideration and plaintiff can make out his case without any reliance upon the unlawful transaction, the enforcement of its rights will not be denied plaintiff.⁴⁵ And where it is charged that a foreign corporation did business in the state without having complied with a statute imposing certain conditions upon foreign corporations doing business in the state, and that the notes in question were taken in connection with a transaction had in the state by a foreign corporation without having complied with such statute the charge is not established where it is not made to appear by the proof tendered that the notes in question were not given in connection with business done by drummers or traveling salesmen.⁴⁶

§ 5965. Right of assignee to enforce contract of noncomplying foreign corporation. The right of a bona fide holder for value and without notice to enforce negotiable instruments given to a foreign corporation doing business in a state without compliance with conditions imposed upon it, when such notes arise out of business done in the state, has been considered elsewhere.⁴⁷ It now becomes necessary to consider the rights of an assignee of a contract, or rights arising thereunder, where such contract arises out of business done or transactions had in a state by a corporation which has not complied with conditions precedent to its right to do business in the state. It is

value without notice, as such constitutional and statutory provisions do not make contracts entered into by a noncomplying corporation null and void. *Jones v. Martin*, — Ala. —, 74 So. 761.

⁴⁴ *St. Louis Union Trust Co. v. Chicot County Cotton-Alfalfa Farm Co.*, 127 Ark. 577, 193 S. W. 69.

⁴⁵ *Missouri Fidelity & Casualty Co. v. Art Metal Const. Co.*, 242 Fed. 630. The note in suit in this case was given to a foreign corporation, which was

engaging in business in Missouri without having complied with the state statutes, in payment for goods sold by it to a domestic corporation, and extension of time for the payment of the note was twice granted by the plaintiff at the request of the maker and the surety.

⁴⁶ *De Witt v. Flint & Walling Mfg. Co.*, 132 Ill. App. 356. See §§ 5762-5782, *supra*.

⁴⁷ See § 5964, *supra*.

evident that if the effect of such a statute is to make the contract null and void as to the corporation, to permit an assignee of such contract or rights to sue and enforce them would in many instances enable the foreign corporation to escape the legal consequences of its violation of the statute, and would be offensive to the public policy of the state. Consequently such an assignee is held to stand in the same position as the corporation, and to have no greater rights than it had.⁴⁸ Therefore, if the contract or act under which the rights of the assignee arise is illegal, according to the better reasoning the assignee has no more right to enforce it than the corporation would have had.⁴⁹ Accordingly, where a foreign corporation assigning a chose in action could not maintain an action, on account of its noncompliance with the statutes of the state regulating the right of foreign corporations to do business therein, its assignee cannot do so.⁵⁰

In order to settle any doubts as to the rights of an assignee of a corporation which has failed to comply with the conditions precedent to its right to do business in the state, it is sometimes provided in the statute that the prohibition against the maintenance of an action on a contract made in the state by the noncomplying corporation doing business in the state, shall also apply to any assignee of such foreign corporation, or any person claiming under such assignee.⁵¹ The re-

⁴⁸ *Buck Stove & Range Co. v. Vickers*, 80 Kan. 29, 101 Pac. 668; *New State Land Co. v. Wilson*, — Tex. Civ. App. —, 150 S. W. 253.

⁴⁹ *United States. La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980.

Arkansas. Hogan v. Intertype Corporation, 206 S. W. 58.

Idaho. Katz v. Herrick, 12 Idaho 1, 86 Pac. 873.

New York. Halsey v. Henry Jewett Dramatic Co., 190 N. Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25, rev'g 114 App. Div. 420, 99 N. Y. Supp. 1122; *F. J. Emmerich Co. v. Sloane*, 108 App. Div. 330, 95 N. Y. Supp. 39, 1129; *Kinney v. Reid Ice Cream Co.*, 57 App. Div. 206, 68 N. Y. Supp. 325; *Mueller v. William F. Wall Rope Co.*, 5 N. Y. Ann. Cas. 34, 53 N. Y. Supp. 255. See *Nicoll v. Clark*, 13 Misc. 128, 34 N. Y. Supp. 159.

North Dakota. National Bank of

Commerce v. Pick, 13 N. D. 74, 99 N. W. 63.

Texas. Texas & P. Ry. Co. v. Davis, — Tex. Civ. App. —, 54 S. W. 381, rev'd 93 Tex. 378, 55 S. W. 562, on the ground that the transaction involved interstate commerce.

⁵⁰ *Buck Stove & Range Co. v. Vickers*, 80 Kan. 29, 101 Pac. 668; *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; *New State Land Co. v. Wilson*, — Tex. Civ. App. —, 150 S. W. 253.

⁵¹ See *Laws New York*, 1901, c. 538; *General Corp. Law N. Y.* § 15; *Laws Vermont*, 1915, c. 59, § 13.

See *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

In *Lindheim v. Sitt*, 33 N. Y. Misc. 62, 68 N. Y. Supp. 145, it was held that where there was no statutory prohibition against a suit by an assignee, he could maintain an action on a con-

ceiver of a noncomplying foreign corporation is not an assignee of the corporation within the meaning of a statute prohibiting the maintenance of a suit by a noncomplying foreign corporation or its assignee, and is not prohibited thereby from maintaining a suit for the benefit of the creditors of the corporation.⁵²

§ 5966. Status of contract made with partnership of which non-complying corporation a member. Where a statute renders void contracts made in the state by a foreign corporation which has not complied with the conditions imposed by the statute regulating the right of foreign corporations to do business in the state, it is held that a contract entered into in the state by a copartnership composed of an individual and of a corporation doing business in the state without complying with the statute is void and unenforceable.⁵³ If this were not so, a foreign corporation, desiring to do business in the state, but unwilling to comply with the statutory conditions precedent to its right to do business in the state, could associate itself in a partnership with one or more individuals, and carry on business operations in flagrant disregard of the statute, and then invoke successfully the protection of its rights under the disguise of the partnership.⁵⁴ Thus under a statute providing that no foreign corporation

tract made in the state. Later it was held by the New York Supreme Court that the assignee of a corporation doing business in the state stood in no better position than the assignor. *Mueller v. William F. Wall Rope Co.*, 5 N. Y. Ann. Cas. 34, 53 N. Y. Supp. 255; *Kinney v. Reid Ice Cream Co.*, 57 N. Y. App. Div. 206, 68 N. Y. Supp. 325. In order to settle the doubt upon this question, the New York legislature enacted the above statute. The provision was held inapplicable to an action by an assignee on a contract made before its passage. *McNamara v. Keene*, 49 N. Y. Misc. 452, 98 N. Y. Supp. 860. Subsequently, however, the New York Court of Appeals in *Halsey v. Henry Jewett Dramatic Co.*, 190 N. Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25, held that independently of statute an assignee of a foreign corporation cannot sue on a contract which the corporation could

not sue upon, the court saying: "We think that the assignee has no greater right than the corporation itself, and that the defense available against the corporation under the statute would also be good as against the assignee, except as to negotiable paper taken in good faith from the corporation before maturity."

⁵² *Underhill v. Rutland R. Co.*, 90 Vt. 462, 98 Atl. 1017.

⁵³ *Harris v. Columbia Water & Light Co.*, 108 Tenn. 245, 67 S. W. 811; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

⁵⁴ *Harris v. Columbia Water & Light Co.*, 108 Tenn. 245, 67 S. W. 811. The court added: "Or it might occur that in the course of such business operations the individual members of the firm should die, leaving this corporation the sole survivor, and alone entitled to sue (see illustration put by Lord Abinger, C. B., in the leading

shall transact business or acquire or hold property in the state, until such corporation has complied with certain statutory conditions prerequisite to its doing business in the state, and that every contract affecting its personal liability or relating to property within the state before compliance by it with the requirements of the statute shall be void, it was held that a contract made in the state by a copartnership composed of two foreign corporations, which had not complied with the statutes, and an individual, whereby such copartnership agreed to purchase certain lumber to be used in its factory situated in the state, was void for the reason that the two foreign corporations had not complied with the statute and that the individual partner could assert no rights thereunder.⁵⁵ Also, under a statute which did not, in express terms, declare void the contracts of corporations doing business within the state in violation thereof, but which was construed by the courts of the state to render void and unenforceable contracts made in the state by a foreign corporation doing business within the state, without compliance with the law, it was held that a copartnership located and doing business in the state and composed of two individuals and a foreign corporation which had not complied with the requirements of such statute could not enforce a contract made by the copartnership in the state and to be performed therein.⁵⁶

case of *Wallace v. Kelsall*, 7 Mees. & W. 264; and we would have the anomalous state of things, that while the members of the firm, so long as it was intact, could resort to the courts of the state for a redress of the firm's grievances, notwithstanding the disqualification of one of its members, yet when dissolved by death the sole surviving member, thus disqualified, would be repelled. Such results would certainly be anomalous, and sound public policy would require a practice that would make them impossible. * * * While there is not lacking dissent to this view, yet the weight of the cases, supported by sound reason, as we think, is that all must be repelled when one of the firm has by his acts disqualified himself. *Homer v. Wood*, 11 Cush. 62; *Farley v. Lovell*, 103 Mass. 387; *Jones v. Yates*, 9 Barn.

& C. 532; *Church v. Bank*, 87 Ill. 68; *Blodgett v. Sleeper*, 67 Me. 499; *Greeley v. Wyeth*, 10 N. H. 15. These cases assert the rule that 'all the plaintiffs must be entitled to recover, or the suit cannot be maintained, and any matter that will negative the right of one of the partners to bring suit is sufficient to defeat the action. * * * By joining in the suit the partner who has done the wrongful act, they rely on his right to recover, and must abide by all his acts; and, if any one of them would bar the right of one partner, this is sufficient to bar the action.' *Cochran v. Cunningham's Ex'r*, 16 Ala. 448, 50 Am. Dec. 186."

⁵⁵ *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

⁵⁶ *Harris v. Columbia Water & Light Co.*, 108 Tenn. 245, 67 S. W. 811.

§ 5967. Noncompliance with statute as affecting matters not arising out of contract. In preceding sections, the right of a foreign corporation to redress for torts committed against it has been discussed at length, and it has been seen that statutes providing that a foreign corporation doing business in the state shall not maintain an action in the courts of the state for the enforcement of contracts arising from such business unless it shall have complied with certain prescribed conditions do not bar such a corporation from maintaining an action for injury to its property.⁵⁷ A statute providing that before a foreign corporation shall begin to carry on any business in the state it shall perform certain acts therein and that if it shall fail to do so, all its contracts with citizens of the state shall be void as to it and shall not be enforced, does not prohibit a foreign corporation from maintaining an action for injury to its property.⁵⁸ Should anyone do so, such corporation would have a right of action for the injury done, and could bring suit without complying with the laws prescribing the conditions on which foreign corporations are allowed to do business. The right of action, in such a case, would not grow out of or depend upon a violation of the law by it, but would be distinct from, independent of, unconnected with and proximately unaffected by, any business transaction of the company; and the institution or prosecution of a suit would not be a "doing business" within the meaning of the laws prescribing such conditions.⁵⁹

§ 5968. Effect of noncompliance upon service of process. In a leading case upon the service of process upon foreign corporations, the Supreme Court of the United States said: "The state may therefore impose, as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate

⁵⁷ See §§ 5890, 5891, *supra*.

⁵⁸ *Arkansas. St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350. See also *Hooker v. Southwestern Improvement Ass'n*, 105 Ark. 99, 150 S. W. 398.

Idaho. Junction Placer Min. Co. v. Reed, 28 Idaho 219, 153 Pac. 564.

Indiana. See Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 20 L. R. A. 405, 33 N. E. 970; *Pittsburgh, C. C. & St. L. Ry. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995.

Maine. Dominion Fertilizer Co. v. White, 115 Me. 1, 96 Atl. 1069.

Missouri. United Shoe Machinery Co. v. Ramlose, 231 Mo. 508, 132 S. W. 1133; *Broadway Bond St. Co. v. Fidelity Printing Co.*, 182 Mo. App. 309, 170 S. W. 394; *Farrand Co. v. Walker*, 169 Mo. App. 602, 155 S. W. 68.

See §§ 5890, 5891, *supra*.

⁵⁹ *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350, 55 Ark. 163, 18 S. W. 43. See §§ 5890, 5891, *supra*, and *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Jones v. Southern Cooperage Co.*, 94 Ark. 621, 127 S. W. 704.

that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process upon its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process."⁶⁰ If a corporation fails to comply with the laws of the state prescribing conditions upon which foreign corporations may do business therein, it is, nevertheless, subject to the laws of the state, and amenable to its process,⁶¹ and process may be served upon the person who is transacting its business in the state.⁶² A distinction is drawn between a statute providing for service

⁶⁰ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. See, also, §§ 6030-6039, *infra*.

"Subject to exceptions, not material here, every state has the undoubted right to provide service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service in proper cases may be made upon an officer designated by law." *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492.

⁶¹ *United States v. Funk v. Anglo-American Ins. Co.*, 27 Fed. 336.

California. *Thomas v. Placerville Gold Quartz M. Co.*, 65 Cal. 600, 4 Pac. 641.

New York. *Tuehband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360; *Pringle v. Woolworth*, 90 N. Y. 502; *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137.

Pennsylvania. *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534.

South Dakota. *Foster v. Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490,

49 Am. St. Rep. 859, 58 N. W. 9.

See §§ 6030, 6038, 6040, *infra*.

⁶² *United States*. *Knapp Stout & Company v. National Mut. Fire Ins. Co.*, 30 Fed. 607; *Funk v. Anglo-American Ins. Co.*, 27 Fed. 336; *Moch v. Virginia Fire & Marine Ins. Co.*, 10 Fed. 696.

Colorado. See *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57.

Kentucky. *Pennbaker Bros. v. Bell City Mfg. Co.*, 130 Ky. 592, 113 S. W. 829.

New York. *Clews v. Rockford, R. L. & St. L. R. Co.*, 49 How. Pr. 117.

Pennsylvania. *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534.

South Dakota. *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

See §§ 6030, 6037, 6038, 6040, *infra*.

"In *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534, the Supreme Court of Pennsylvania said: 'When a foreign corporation transacting business in this state has failed to establish an office, and report the name of an agent, * * * but has some person residing therein as its agent, it must

upon an agent of the corporation who is acting for it in the state and a statute requiring a foreign corporation before doing business in the state to file a stipulation agreeing that service of process upon a certain officer of the state shall be binding upon the corporation. According to one view, where a foreign corporation doing business in the state has failed to comply with such statutory requirement, service upon such state official is insufficient to confer jurisdiction to render judgment against the corporation.⁶³ A contrary view is taken, however, by other courts.⁶⁴

§ 5969. Right of noncomplying corporation to defend action. The prohibition by a state of the maintenance of actions in its courts by a

be presumed that the corporation has substituted such agent as the one on whom service is authorized to be made, to the extent, at least, of its unfinished business in this state.' This seems to be the true rule. If a corporation fails to comply with the laws of the state, but is still engaged in business therein, and permitted to carry on such business, it must transact its business here subject to the laws of the state, and its assent to service upon its managing agent is implied." *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9, quoting with approval *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

⁶³ *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206, declining to follow *Ehrman v. Teutonia Ins. Co.*, 1 Fed. 471.

The California statute (Civ. Code, § 405) authorizing service on the secretary of state where a foreign corporation had not designated any agent for service was held unconstitutional for failure to provide for notice by the secretary of state to the corporation. *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

⁶⁴ *Vulcan Const. Co. v. Harrison*, 95 Ark. 588, 130 S. W. 583; *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark.

578, 31 S. W. 148; *Olender v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082; *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 12 Cal. App. 445, 107 Pac. 633.

In *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148, it was said: "Assuming, for the purpose of this opinion, that the court's finding of fact was correct, then 'that the stipulation was not in fact filed with the auditor is of no consequence, if the company has done those things which imposed upon it the obligation and duty to file it. The law deduces the agreement on the part of the company to answer in the courts of this state, on service made upon the auditor from the fact of its doing business in the state.' And this is conclusive, and cannot be disputed. *Ehrman v. Teutonia Ins. Co.*, 1 McCrary 123, 1 Fed. 471, and authorities cited.'"

Under a statute which requires every foreign corporation to designate an agent for service of process "at the time of filing the certified copy of its articles of incorporation," and that in event it fails to do so, service in actions against it may be had upon it by serving the secretary of state, service may not be had in such manner upon a foreign corporation which has not filed its articles of incorporation. *Winston v. Idaho*

foreign corporation is not an inhibition of defending actions brought against a foreign corporation.⁶⁵ A statute prohibiting a foreign corporation which has not obtained a certificate from the secretary of state that certain statements have been made and filed by it from prosecuting any action in any of the courts of the state does not apply to corporations which have been summoned into court to defend

Hardwood Co., 23 Cal. App. 211, 137 Pac. 601.

65 United States. Blodgett v. Lanyon Zinc Co., 120 Fed. 893.

California. Winston v. Idaho Hardwood Co., 23 Cal. App. 211, 137 Pac. 601.

Idaho. War Eagle Consol. Min. Co. v. Dickie, 14 Idaho 534, 94 Pac. 1034.

Kansas. Swift & Co. v. Platte, 68 Kan. 1, 74 Pac. 635, 72 Pac. 271.

New York. Bischoff v. Automobile Touring Co., 97 App. Div. 17, 89 N. Y. Supp. 594; Jones v. Wells Fargo Exp. Co., 83 Misc. 508, 145 N. Y. Supp. 601.

Wisconsin. Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co., 144 Wis. 362, 129 N. W. 595.

See § 6014, *infra*.

In considering a statute providing that a foreign corporation shall not maintain or defend any action or proceeding in any court of the state unless such corporation shall have complied with the provisions of the statute, the California Court of Appeal said: "Whether the prohibition against defending an action in case of its noncompliance with the statute would authorize a judgment against the corporation as upon a default may be open to dispute. It is not to be supposed that the legislature, by taking away the right to defend any action, intended that the corporation should be without the protection of the law, or that its property might be confiscated through the forms of law without any right to defend against the same. See *Windor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914." *Black v. Vermont Marble Co.*, 1 Cal. App.

718, 82 Pac. 1060. See also *Winston v. Idaho Hardwood Co.*, 23 Cal. App. 211, 137 Pac. 601.

Under a statute providing that no foreign corporation doing business in the state shall maintain any action in the state upon any contract made by it in the state unless prior to the making of such contract it shall have procured a certificate of compliance from the secretary of state, it is held that a foreign corporation doing business in the state without compliance may defend on all proper grounds an action brought against it for negligence. The court said: "The use of the public streets or highways in the state by foreign corporations to which no certificate has been issued does not constitute a nuisance or involve the commission of a trespass; and such corporations when sued for negligence are entitled to avail themselves of contributory negligence on the part of the plaintiff as a defense. In other words, the statutory requirement which is made a condition precedent to the maintenance of an action upon contract by a foreign corporation has no application to an action against such corporation for tort. A violation of a statute does not necessarily place the offender beyond the protection of the law." *Bischoff v. Automobile Touring Co.*, 97 N. Y. App. Div. 17, 89 N. Y. Supp. 594.

A foreign express company not having complied with such a statute may, when it is sued for goods lost in shipment, assert as a defense a stipulation in the shipping receipt for such goods issued by it limiting its liability on

against actions brought against them.⁶⁶ Upon an application for the appointment of a receiver for a foreign corporation, where the title and possession of such corporation to property is attacked, it is error for the trial court to refuse to consider the answer of such foreign corporation on the ground that it has failed to comply with the laws of the state regulating foreign corporations doing business in the state.⁶⁷

§ 5970. Effect of noncompliance on right to appeal from judgment.

As has been seen in the preceding section, a statute prohibiting a foreign corporation which has not obtained from the secretary of state a certificate that certain statements have been made and, filed by it from prosecuting an action in any of the courts of the state does not apply to corporations which have been summoned into court and made to defend against actions brought by others.⁶⁸ It is also held that such a statute does not prevent such a corporation from obtaining a review and reversal of a judgment rendered against it in such an action, as the action mentioned in the statute refers to an ordinary proceeding in a court of first instance, and not to an appellate proceeding brought to correct the errors of such court.⁶⁹

certain contingencies. *Jones v. Wells Fargo Exp. Co.*, 83 N. Y. Misc. 508, 145 N. Y. Supp. 601.

⁶⁶ *Swift & Co. v. Platte*, 68 Kan. 1, 74 Pac. 635, 72 Pac. 271.

⁶⁷ *Idaho Fruit Land Co. v. Great Western Sugar Beet Co.*, 17 Idaho 273, 105 Pac. 562.

⁶⁸ See § 5969, *supra*.

⁶⁹ *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, *rev'd* on other grounds 68 Kan. 1, 74 Pac. 635.

In *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635, the court said: "It will be observed that the prohibition is directed at the bringing of actions, and not at the making of defenses to actions rightly brought. *Platte* brought the company into court, and, having forced it into litigation, he is hardly in a position to say that it shall not contend with him to the end of the litigation. The action mentioned in the statute refers to an ordinary proceeding in a court of first in-

stance, and not to an appellate proceeding brought to correct the errors of such court. The proceeding in this court, although in some respects distinct from the action in the trial court, and although the steps taken in the commencement of each are somewhat analogous, is purely appellate, and is, in a certain sense, a continuation of the controversy in the district court. Instead of there being a right of action in *Swift & Co.*, it is only a right of review; and, while the company institutes the proceeding here, it is still in an attitude of defense, and is resisting the claims and contentions of the plaintiff below. The jurisdiction of the court in such cases is limited to a review of the rulings of the district court, and in event of a reversal the case is commanded for a retrial. The commencement of such a proceeding cannot be regarded as the prosecution of an action, within the meaning of the statute, and the prohibition can

§ 5971. Effect of noncompliance in federal courts. The effect of a statute prohibiting any foreign corporation from doing business in a state before certain conditions precedent to its right to do business in the state are complied with depends upon the terms of the statute and whether the same has been construed by the courts of the state. If the statute expressly provides that a contract made in the state before compliance with the statute by a foreign corporation amenable to its provisions is void, the same effect will be given to such statute, when a contract in contravention thereof is the basis of an action in the federal court.⁷⁰

Pursuant to the general rule that the federal courts are bound by the interpretation placed by a state court upon the constitution and statutes of the state, the federal courts in construing a state statute regulating the right of foreign corporations to do business within the state will be governed by the construction given to such statute by the local court of last resort.⁷¹ Consequently, if the courts of the state by which such statute was enacted hold that contracts made in the state by a foreign corporation not having complied with the statute are void and no action can be maintained thereon, the same effect will be given to such statute by the federal courts, and no action

never apply to the institution of a proceeding in error by one summoned into a trial court, and made to defend against an action brought by another."

⁷⁰ *Chattanooga National Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, aff'g 103 Fed. 838; *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980; *Vitagraph Co. of America v. Twentieth Century Optiscope Co.*, 157 Fed. 699; *Groton Bridge & Manufacturing Co. v. American Bridge Co.*, 151 Fed. 871. See, generally, *New York Cotton Exchange v. Hunt*, 144 Fed. 511, aff'd 205 U. S. 322, 51 L. Ed. 821.

Under a statute providing that every foreign corporation, before transacting business in the state, shall file a certain declaration, pay certain

fees and appoint an attorney in fact by a power of attorney to be filed in the office of the secretary of state, and that it shall be the duty of every such corporation to maintain at all times within the state some qualified person as its attorney in fact, and in default thereof it shall not be entitled to transact any business within the state or maintain any suit, action or proceeding in its courts, it is held that an action cannot be maintained in the federal courts of the state to enforce a contract made and entered into in the state and arising out of business transacted in the state by a foreign corporation in contravention of such statute. *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980.

⁷¹ *National Mut. Building & Loan Ass'n v. Brahan*, 193 U. S. 635, 48 L. Ed. 823, aff'g 80 Miss. 407, 57 L. R. A. 793, 31 So. 840; *Tennis Bros. Co. v. Wetzel & T. Ry. Co.*, 140 Fed. 193,

can be maintained in the federal courts.⁷² But the federal courts have steadily adhered to the rule that, in the absence of an express provision of the statute to the contrary, the innocent contracts and acts of a foreign corporation which has failed to comply with statutes permitting it to do business in the state where contracts are made and the acts are done are, nevertheless, valid and enforceable, for the reason that it will not be presumed that it was the intent of the authors of such laws to strike down such agreements and acts when they are not evil in themselves.⁷³ A statutory provision which does

aff'd 145 Fed. 458, 7 Ann. Cas. 426; *Williams v. Gaylord*, 102 Fed. 372, aff'd 186 U. S. 157, 46 L. Ed. 1102.

⁷² *Chattanooga National Building & Loan Ass'n v. Denson*, 189 U. S. 408, 47 L. Ed. 870; *National Mercantile Co., Ltd. v. Watson*, 215 Fed. 929; *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980; *Cyclone Min. Co. v. Baker Light & Power Co.*, 165 Fed. 996; *Groton Bridge & Manufacturing Co. v. American Bridge Co.*, 151 Fed. 871; *Tennis Bros. Co. v. Wetzel & T. Ry. Co.*, 140 Fed. 193, aff'd 145 Fed. 458, 7 Ann. Cas. 426.

⁷³ *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914 A 699; *Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co.*, 208 Fed. 976; *Colby v. Cleaver*, 169 Fed. 206; *Groton Bridge & Manufacturing Co. v. American Bridge Co.*, 151 Fed. 871; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7.

"It is a familiar principle that the federal courts do not follow the penal statutes imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a state cannot shut up the federal courts, nor deny parties access thereto. They may prescribe rules of property, and declare contracts within their juris-

diction null and void, and thereupon the federal courts will enforce the rules of property and refuse to enforce the void contracts; but, if the legislature leaves the contract valid, enabling the parties to enforce it within jurisdictions that are not amenable to the legislature of Tennessee, I see no reason why the federal courts may not enforce such contracts, although their enforcement is prohibited by the courts of the state. This is not, however, to be misunderstood, as applying to those cases where the legislation is the exercise of a police power based upon a public policy appertaining to the health, morals, or safety of the state * * *. That class of cases is very near akin to those constituting rules of property. At all events, the federal courts will not enforce contracts that are vicious because they are contrary to the declared will of the legislature exercising that care for the health, morals, or safety of the public to which we have adverted. But it does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves, and nonenforceable in state courts, only because they are not in conformity to certain prescribed preliminary rules and regulations of an administrative character, necessary to be complied with before suit can be brought upon them in the state courts." *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7.

not render the contracts of noncomplying foreign corporations void, but merely provides that such corporation shall not maintain any actions upon them in the courts of the state, does not prevent non-complying corporations from maintaining actions on such contracts in the federal courts.⁷⁴ So under a statute requiring every foreign cor-

Under a statute providing that no foreign corporation shall do business or bring or maintain any action in the state until it shall have complied with certain requirements of the statute and that its failure to do so may be pleaded in abatement of any such action, it was held that where a corporation had not complied with the statute prior to the performing of certain work, taking out a mechanic's lien therefor and the institution of a suit to enforce such lien, but prior to the determination of, and entry of the final decree in, such suit, it did so qualify, the omission on the part of the corporation to comply with the statute did not operate to end a suit otherwise regularly instituted or to destroy a right in other respects validly existing, and the greatest effect, as far as the federal courts are concerned would be to suspend the prosecution of such suit until compliance was had with the statute. *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 7 Ann. Cas. 426.

See also *Kruegel v. Standard Savings & Loan Ass'n*, — Tex. Civ. App. —, 196 S. W. 283.

⁷⁴ *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914 A 699; *Thomas v. Birmingham Railway, Light & Power Co.*, 195 Fed. 340; *Richmond Cedar Works v. Buckner*, 181 Fed. 424; *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182; *Colby v. Cleaver*, 169 Fed. 206; *Groton Bridge & Manufacturing Co. v. American Bridge Co.*, 151 Fed. 871; *Blodgett v. Lanyon Zinc Co.*, 120 Fed.

893; *Eastern Building & Loan Ass'n v. Bedford*, 88 Fed. 7; *Sullivan v. Beck*, 79 Fed. 200; *Kruegel v. Standard Savings & Loan Ass'n*, — Tex. Civ. App. —, 196 S. W. 283.

In construing the New York statute providing that every foreign corporation shall pay a certain license fee for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in that state and that no action shall be maintained or recovery had in any of the courts in the state by such corporation without obtaining a receipt for such license fee within a certain time after beginning such business in the state, and another statute of the same state providing that no foreign corporation shall do business in the state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in the state and that no such corporation doing business in the state without this certificate shall maintain any action in the state upon any contract made by it in the state until it shall have procured the certificate, it was held that, as neither of such statutes declared that a contract made by a foreign corporation in contravention of the statute should be void, but merely suspended the remedy in the courts of the state until the statutory conditions were complied with, and as there was no decision of the highest court of review in New York holding that such a contract was void, an action on such a contract might be maintained in the federal court, in *Groton Bridge &*

poration before doing business in the state to file in certain offices

Manufacturing Co. v. American Bridge Co., 151 Fed. 871, the court said: "If the laws of the state declare such a contract illegal and void, or forbid the doing of the acts to be done under it, or declare that all contracts made by such a foreign corporation, which has not complied with its laws, within the state or to be performed there, shall be illegal or void, then such contracts are void. If the highest court of the state has given construction to its statutes fixing the conditions on which a foreign corporation may do business within the state, and held they make all contracts entered into by it without complying with such conditions void, and they do not directly relate to interstate commerce, or discharge citizens from their contract obligations, or are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense * * * then the courts of the United States are bound by and give effect to such construction * * * but such contracts are not necessarily void because of noncompliance with such conditions (*Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317), and the Court of Appeals of the state of New York has not given such a construction to the statutes referred to. * * * It is evident that the question rests largely on the interpretation to be put on the language of the statute itself, and as determined by the highest court of the state where such determination had been had. * * * That the legislature of a state cannot effectively forbid the bringing of a suit in the federal courts

is decided in *Bank of B. N. A. v. Barling* (C. C.) 44 Fed. 641; *Barling v. Bank of B. N. A.*, 50 Fed. 260, 1 C. C. A. 570; *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302; *Sullivan v. Beck* (C. C.) 79 Fed. 200; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79." See also *New York Breweries Co., Ltd. v. Johnson*, 171 Fed. 582.

In *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914 A 699, Justice Hughes said that "in *Máhar v. Harrington Park Villa Sites*, 204 N. Y. 231, 38 L. R. A. (N. S.) 210, 97 N. E. 587, the Court of Appeals of New York has declared that a contract made by a foreign corporation doing business within the state without certificate of authority is not absolutely void; that the only penalty prescribed by the General Corporation Law for a disregard of the provisions of § 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects. * * * In this view, despite its transaction of business without authority, the foreign corporation could sue upon its contracts in any court of competent jurisdiction other than a court of the state of New York. Accordingly, it was held by the Court of Errors and Appeals of New Jersey that a suit might be brought by the corporation in that state upon a contract made in New York, where it was doing business without the prescribed certificate. *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. The court conceded the general rule both in New Jersey and New York to be that a contract void by the law of the state where made would not be enforced in the state of the forum. But it was held that the New York statute did

certain documents and designate an agent for the service of process, and providing that no contract or agreement made in the name of or for the use or benefit of such corporation, prior to such filings "can be sued upon or be enforced in any court of this state," it was held that the legislature did not intend to make such contracts or agreements absolutely void, but intended that the doors of the state tribunals should be closed against a foreign corporation which had transacted business in the state in violation of the state laws, and that the phrase "in any court of this state" did not embrace federal courts, and consequently an action to foreclose a mortgage on land in the state executed to a foreign corporation doing business in the state without compliance with its laws might be maintained in the federal courts sitting in the state, if the requisite diversity of citizenship and amount in controversy existed.⁷⁵ Under a statute requiring foreign

not in terms declare the contract void; it provided that no such action should be maintained in that state. In dismissing the writ of error to review that judgment (*Allen v. Allegheny Co.* 196 U. S. 458, 465, 49 L. Ed. 551, 556), this court commented upon the decision of the New York court in the case of the *Neuchatel Asphalt Co. v. New York*, 155 N. Y. 373, 49 N. E. 1043, which rose under the statute in an earlier form, the section (15) of the General Corporation Law then providing that the foreign corporation should not maintain 'any action in this state upon any contract made by it in this state until it shall have procured such certificate.' This court said: 'The Court of Appeals in that case held that the purpose of the act was not to avoid contracts, but to provide effective supervision and control of the business carried on by foreign corporations; that no penalty for non-compliance was provided, except the suspension of civil remedies in that state, and none others would be implied. This corresponds with our rulings upon similar questions. *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317.' It must follow, upon the similar construction of § 15, as it read at the

time of the transaction in question, that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the federal court. The state could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the federal courts for the enforcement of a valid contract."

It was also held by the federal court sitting in New York that the amended New York statute providing that no such foreign corporation doing business in the state "shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate," does not make void the contracts of foreign corporations not complying with its provisions, but merely excludes such corporations from the state courts, and leaves open to them the federal tribunals. *New York Breweries Co., Ltd. v. Johnson*, 171 Fed. 582, *aff'd* 178 Fed. 513.

⁷⁵ *Colby v. Cleaver*, 169 Fed. 206. The court said: "If the legislature

corporations to perform certain conditions prerequisite to the right to

had declared such contract, or the portions thereof in favor of the defaulting corporation, to be void, or if it were provided that such contract is not enforceable by or on behalf of such corporation or its assignee, there would be no room for doubt as to the legislative intent; but the provision is that such a contract cannot 'be enforced in any court of this state.' In interpreting a statute, it is generally the duty of the court to give to each of its several clauses and phrases some meaning. The exceptions to the rule are rare. The phrase 'of this state' does not inject into the enactment either conflict or ambiguity; nor, if retained, is it materially at variance with the remedial purpose of the legislation, and I am unable to discern any valid reason for rejecting it. What significance did the legislature attach to it? If it is to be given any meaning at all, it must be one of limitation. If it was the intention of the legislature to provide that such a contract should not be enforceable in any court, why was not the phrase 'of this state' omitted? Apt phraseology to express the idea of absolute nonenforceability readily suggests itself, and it is impossible to avoid the conclusion that it was not the intention to declare such a contract wholly unenforceable, but only to deny to the delinquent corporation certain means of enforcement. In other words, the state legislature intended that the doors of the state tribunals should be closed against a foreign corporation which had transacted business in the state in violation of the state laws. If this view be correct, the clause does not, by its terms, embrace federal courts. Such seems to be the natural and obvious meaning of the language used by the legislature. Is such a construction subject to any valid objection? Will it

tend to vitiate the statute, or to render it ineffectual in remedying the evil to which it was directed? Is there any inherent probability that the phrase was unadvisedly or inadvertently incorporated and retained in the act? The questions must, I think, be answered in the negative. In speaking of a similar provision of the laws of the state of Kansas, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Blodgett et al. v. Lanyon Zinc Company*, 120 Fed. 893, 58 C. C. A. 79, decided a few days before the approval of the act under consideration, says: 'The statutes under consideration require foreign corporations seeking to do business in the state of Kansas to comply with the requirements there set forth. For a failure to comply with some of them, they prohibit the company from maintaining actions in the courts of the state of Kansas; but a prohibition of the commencement or of the maintenance of suits is not an inhibition of defending them, and the appellee is the defendant in the suit in hand. Moreover, the inhibition by a state of the maintenance of actions in its courts does not affect the right of a citizen or of a corporation to maintain them in the national courts. The jurisdiction of the federal courts was not conferred, and it cannot be withdrawn or limited, by the legislation of the states. It was granted by the people, through the Constitution and the acts of Congress, and an amendment of the Constitution or an act of Congress, is requisite to destroy or diminish it.' Upon the authority of this decision, it was argued at the hearing that it would be incompetent for the state legislature to enact a law purporting to deprive a foreign corporation of the right to have its controversies tried out in the federal courts, and that,

do business therein and providing that every corporation failing to do so shall be subject to penalty of a prescribed sum and that, in addition to such penalty, no suit may be maintained by such corporation upon any claim in any court of the state, it was held by the federal court sitting in such state that as the act does not undertake to invalidate any contract entered into with, or cause of action arising to,

if the act be construed as against a prohibition against suing upon or enforcing such contracts in the federal courts, it is to that extent invalid. Without intimating any opinion as to the merits of this contention, or whether it is supported by the language of the Circuit Court of Appeals above quoted, it is sufficient to say that the decisions are somewhat variant upon the point, and that a doubt has more or less commonly prevailed as to just how far a state legislature may go in limiting the rights of parties when they seek to bring their controversies into the federal courts. It is not improbable, therefore, that in view of this uncertainty the legislature thought it best to exercise the precaution of limiting the operation of the law to the tribunals over which and concerning the procedure in which it exercised undoubted control. I do not intimate that the legislature could not have made such contracts nonenforceable in the federal courts. Upon this question I express no opinion. I refer to the prevailing doubt, on the subject only for the purpose of illuminating, if possible, the motive and intent of the legislature in using the phrase under consideration. It may reasonably have been concluded that it would be better to err upon the side of caution, and to enact legislation which, while not as broad as possibly it might be, would be of undoubted validity, and would still be sufficient to effect the object in view; and upon reflection it will appear that limiting the operation of this clause to the state courts, does not materially dimin-

ish the penalties prescribed for a violation of the law, and still leaves them amply sufficient to compel compliance. It is a matter of familiar knowledge that the federal courts can acquire jurisdiction of comparatively few controversies. The great bulk of litigation must, of necessity, go into and stay in the state courts. It is hardly conceivable that, merely because of the possibility that of its rights of action a few may be of such character and magnitude as to give it access to a federal court, a foreign corporation will, by knowingly failing to comply with the comparatively simple and inexpensive requirements of the state statutes, wilfully place itself in a position where it will, in the main, be without any tribunal to which it can resort to enforce its rights against parties with whom it transacts business. Moreover, the corporation is still deprived of the benefit of the statutes of limitations, its agents are liable upon its contracts as principals, and deeds to it are void. Therefore, by giving to the phrase 'the courts of this state' its natural and apparent meaning, the penalties to which the defaulting corporation subjects itself are not materially diminished and the efficiency of the act will remain substantially unimpaired. The legislature having prescribed certain penalties, it is not for the courts to add thereto."

See also *Richmond Cedar Works v. Buckner*, 181 Fed. 424; *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182.

such foreign corporation, but merely subjects it to a fine and closes the state courts against any remedy, a corporation doing business in the state without compliance with the statute can maintain an action in the federal court on a cause of action arising under a federal statute and which does not appear in any manner to have grown out of, or to have been affected by, the alleged wrongful act of the corporation doing business in the state contrary to law.⁷⁶

It should be borne in mind, however, that an exception arises to the rule that the federal courts in construing a state statute will follow the decisions of the highest court of the state by whose legislature the statute was enacted, where contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals. In such cases the federal courts have the right to adopt their own interpretation of the law applicable to the case, although

⁷⁶ *Vitagraph Co. of America v. Twentieth Century Optiscope Co.*, 157 Fed. 699. *Kohlsaat, J.*, said: "It is the settled law in the federal courts that a cause of action arising in a state, which, by statute, makes the same void, would as a general proposition be held void in the federal court. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137; *Diamond Glue Co. v. U. S. Glue Co. (C. C.)*, 103 Fed. 839; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 47 L. Ed. 328. It nowhere appears in the pleadings, however, that the cause of action herein in any manner grew out of, or was affected by, the alleged wrongful act of complainant in doing business in this state contrary to law. This cause arises under the United States statutes, and, so far as it applied to a copyright, is within the exclusive jurisdiction of the United States courts. Plainly stated, the pleas are based upon the contention that, because complainant has failed to comply with a state statute denying the use of state courts in such a case to it, therefore the federal courts may not be open to it. The latter decide

for themselves what matters they will entertain, and cannot abdicate to the state the power to so decide. In *Columbia Wire Company v. Freeman Wire Company (C. C.)*, 71 Fed. 302, Judge Adams, speaking upon this question, says: 'It is sufficient to say, with regard to this contention, that whatever construction may be given to this law by the state courts in respect to suits coming within their exclusive jurisdiction, it cannot be made applicable to suits instituted in the federal courts without denying the jurisdiction conferred by Congress upon such courts.' In *Groton Bridge Company v. American Bridge Company (C. C.)*, 151 Fed. 874, Judge Ray holds that a corporation having good cause of action 'may recover in any United States court having jurisdiction, in the very teeth of an express statute of the state saying it shall not.' For a full discussion of this question, see the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Butler Bros. Shoe Co. v. United States Rubber Company*, 156 Fed. 1, and *Dunlap v. Mercer*, 156 Fed. 545."

a different interpretation may be adopted by the state courts after such rights have accrued.⁷⁷

§ 5972. Effect of compliance after institution of suit. Where a contract entered into by a foreign corporation is void on account of its noncompliance with the statutory prerequisites to its right to do business in the state, no act of it thereafter by taking out a license or otherwise complying with the statutory requirements can validate it.⁷⁸ And under a statute providing that a foreign corporation

⁷⁷ *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *United States Savings & Loan Co. v. Harris*, 113 Fed. 27.

⁷⁸ *Colorado. Western Electrical Co. v. Pickett*, 51 Colo. 415, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913 A 1322, 118 Pac. 988.

Illinois. United Lead Co. v. J. W. Reedy Elevator Mfg. Co., 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567.

Kentucky. Hayes v. West Virginia Oil, Gas & By-Products Co., 183 Ky. 622, 210 S. W. 174; *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 40 L. R. A. (N. S.) 857, 143 S. W. 6.

Minnesota. G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 121, 88 N. W. 441.

Missouri. Parke, Davis & Co. v. Mullett, 245 Mo. 168, 149 S. W. 461; *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; *United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567; *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086; *Chicago Mill & Lumber Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; *Kelly Broom Co. v. Missouri Fidelity & Casualty Co.*, 195 Mo. App. 305, 191 S. W. 1128; *Manufacturing Co. v. Wendelkin Const. Co.*, 124 Mo. 349, 101 S. W. 702; *Wilson-Moline*

Buggy Co. v. Priebe, 123 Mo. App. 521, 100 S. W. 558; *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636. Compare *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772.

New York. Halsey v. Henry Jewett Dramatic Co., 114 App. Div. 420, 99 N. Y. Supp. 1122.

Oklahoma. Goodner Krumm Co. v. J. L. Owens Mfg. Co., 51 Okla. 376, 152 Pac. 86.

For effect of statutes merely suspending the remedy until compliance with the statutory requirements, see § 5944, supra.

In Missouri, under a statute providing that a foreign corporation which shall neglect or fail to comply with its conditions shall be subject to a fine and that "in addition to which penalty * * * no foreign corporation * * * which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand whether arising out of contract or tort," it was held that though, at the time of the institution of the suit by a foreign corporation, doing business in the state, it had not complied with the statute, a motion to dismiss the suit on account of such noncompliance would be denied, if at the time the motion to dismiss was filed the plaintiff had met fully the demands of the law, as the word "maintain" did not include also the

doing business in the state without first complying with the provi-

word "begin." *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772. The court said: "At the time the motion to dismiss was filed, plaintiff had fully met the demands of the law. But it did not meet them before beginning the action. That is all there is in the objection to the proceeding as made by the motion to dismiss. The statute does not, in express terms, forbid the bringing of an action by such a company. It declares that it cannot 'maintain' an action, not having complied with the law. What was the paramount object of the enactment? Not to exclude such concerns from participation in the business done in Missouri, but to compel a compliance with certain conditions by them. These conditions were imposed with a view probably to place foreign and domestic companies on a footing of equality in the field of commerce. The object of the law was rather to induce observance of those conditions than to deprive any foreign corporation of a right of action or other property. Keeping the general purpose of the law in view, what are we to understand by the word 'maintainable,' as used in the third section? As its structure suggests, it signifies, literally, 'to hold by the hand'; hence, in ordinary use, 'to uphold, to sustain, to keep up,' while in pleading it is defined to mean, 'to support what has already been brought into existence.'"

* * * It is nothing new to the law that a party may maintain an action although at its outset a legal barrier to it existed. This is illustrated by the law touching the defense of another action pending, which defense, though good when put on record, may be defeated by a dismissal of the prior action, and a statement of that fact, by way of reply to the answer con-

taining that defense. * * * It is not necessary at this time to consider whether this statute should receive a broad or narrow construction at our hands, or whether it should be viewed as penal or remedial. It certainly must have a fair and reasonable reading, and should not be enlarged beyond its natural meaning to accomplish the forfeiture of a right of action. No corporation having failed to obey this law can maintain an action. The corollary is that, when it has complied, it may maintain the action. The prohibitory command does not reach the right to begin the action. We should not broaden the language to destroy that right. There is a well-defined distinction between beginning and maintaining an action, viewed with reference to the facts of the controversy now before us. We are bound to assume that the word 'maintain' was chosen to express the exact shade of meaning intended by the law makers. It does not, with its present context, seem to us to include also the word 'begin.' *Philpott v. Jones*, (1834) 2 Adol. & E. 41."

The above case of *Carson-Rand Co. v. Stern*, which has been the subject of much discussion, has, however, been overruled in Missouri. See *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020. In *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31, *Graves, J.*, said: "Not only have our courts discredited the doctrine of the *Carson-Rand Case*, but in Minnesota, wherein they have practically the same statutes as ours,

sions of a statute regulating the right of foreign corporations to do business in the state, cannot maintain an action in the courts of the state upon any contract or demand growing out of such unlawful business, compliance by it with the statute after the making of any such contract or after the commencement of an action thereon will not remove the bar of the statute.⁷⁹ Under a statute providing that before any foreign corporation shall be permitted to transact any business or exercise its corporate powers in the state, it shall comply

the court refused to follow that case. The Minnesota court, in *Brewing Co. v. Peimeisl*, 85 Minn. loc. cit. 124, 88 N. W. 442, says: 'Counsel for the plaintiff practically concede that by virtue of this provision it could not maintain any action in our courts upon such a command until it complied with the statute, but claim that the statute does not prohibit the commencement of the action, and that the plaintiff may, after its noncompliance has been pleaded as a defense comply with the statute and maintain the action. The case of *Carson-Rand v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, is cited in support of this contention. The case is in point, for the statute there under consideration was similar to our own; but we cannot accept this construction of the statute, for a prohibition against maintaining an action implies a prohibition against beginning it, for the beginning of the action is one of the necessary steps in maintaining it. More than that, the construction of the statute urged on behalf of the plaintiff would invite and foster the very evil it was intended to prevent. It would enable foreign corporations to do business in this state in defiance of our laws until some party, perchance, pleaded its noncompliance in an action brought by it to enforce a demand against him. Then it would comply, and the action would proceed. Such a construction is contrary to the letter and spirit of the statute, and, if adopted by the court, would directly

tend to defeat the public policy sought to be enforced by its enactment. The most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction so as to enable foreign corporations to avoid the consequences of a noncompliance with its terms by complying after the penalties have been incurred. We therefore hold that a foreign corporation doing business in this state without first complying with the statute cannot maintain an action in the courts of this state upon any contract or demand growing out of such business. Nor will compliance by it with the statute after the making of such a contract or after the commencement of an action thereon, remove the bar of the statute. The conclusion is supported by the decisions of the courts of other states having a similar statute.'

A contract made in Illinois by a corporation without having complied with the laws of the state as to foreign corporations doing business in the state, cannot be sued on in the state, even though after the making of the contract and before the institution of suit thereon or with respect thereto such corporation has complied with such laws. *Erie & M. Ry. & Nav. Co. v. Central R. Equipment Co.*, 152 Ill. App. 278.

⁷⁹ *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441, refusing to follow *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772.

with certain conditions, and imposing penalties for failure to comply therewith and providing that, in addition to such penalties, if after the taking effect of the statute, any foreign corporation shall fail to comply with such requirements, no suit may be maintained upon any claim in any court of the state, it is held that a contract made in the state by a foreign corporation not having complied with such conditions, cannot be sued on in the state, even though after the making of such contract and before the institution of suit thereon or with respect thereto such corporation has complied with such laws.⁸⁰

As has been stated elsewhere,⁸¹ in some jurisdictions, the right of a foreign corporation which has not complied with the statute relating to foreign corporations is suspended until such compliance.⁸² So under a statute providing that no action shall be maintained or recovery had in any of the courts of the state by any foreign corporation without first complying with the requirements of the statute, it is held that a foreign corporation which has not, at the commencement of an action, complied with the laws of the state, may subsequently comply therewith and maintain the action.⁸³ Thus it was held that the fact that a foreign corporation had not complied with such statute at the time of taking a chattel mortgage did not make the mortgage void, and where, at the time of trial, the incapacity of the foreign corporation to sue, which had existed at the time the action was begun, had been removed, the judgment obtained by it would not be reversed.⁸⁴ The same ruling was made under a statute providing that a foreign corporation which has not complied with its provisions

⁸⁰ *Erie & M. Ry. & Nav. Co. v. Central Ry. Equipment Co.*, 152 Ill. App. 278 (following *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567, and distinguishing *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106, and *McCarthy v. Alphons Custodis Chimney Const. Co.*, 219 Ill. 616, 76 N. E. 850); *Schueler v. Chicago, I. L. Ry. Co.*, 167 Ill. App. 378.

⁸¹ See § 5944, *supra*.

⁸² See *Buck Stove & Range Co. v. Vickers*, 80 Kan. 29, 101 Pac. 668; *Vickers v. Buck Stove & Range Co.*, 70 Kan. 584, 79 Pac. 160.

⁸³ *Ryan Live-Stock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470;

Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418.

It is held in Alabama that although a contract entered into by a foreign corporation may be invalid on account of its noncompliance with Const. Ala. 1901, § 232, and Code Ala. 1907, § 3642, yet, if the corporation subsequently complies with such statutory requirements and thereafter the parties recognize such contract, such conduct may amount to an adoption of the contract by them. *Montgomery Traction Co. v. Montgomery Light & Water Power Co.*, 229 Fed. 672, *aff'g* *Montgomery Light & Water Co. v. Montgomery Traction Co.*, 219 Fed. 963.

⁸⁴ *Hamilton v. Reeves & Co.*, 69 Kan. 844, 76 Pac. 418.

shall not "maintain or defend any action in any court of this state until such corporation shall have complied with the provisions of this act." ⁸⁵ In like manner it is held that a statute providing that every

⁸⁵ *Ward Land & Stock Co. v. Mapes*, 147 Cal. 747, 82 Pac. 426, quoting with approval *Ryan Live-Stock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470, and *California Savings & Loan Ass'n v. Harris*, 111 Cal. 133, 43 Pac. 525, and distinguishing *Keystone Driller Co. v. Superior Court of City & County of San Francisco*, 138 Cal. 738, 72 Pac. 398. The court said: "The language of the law is that the foreign corporation which has not complied with said act shall not 'maintain or defend any action or proceeding in any court of this state until such corporation shall have complied with the provisions of section 1 of this act.' Upon this state of the case, appellant contends that a compliance with the act in question is a condition precedent to the commencement of the action, and that therefore the action should have been dismissed. This question, however, was directly decided by this court adversely to the contention of the appellant in *California Savings & L. Soc. v. Harris*, 111 Cal. 133, 43 Pac. 525. In the opinion in that case it was said: 'At the commencement of this action the plaintiff had not filed the certified copy with the county clerk of Madera county; but it did file it with that officer several months before the defendant filed his amended answer setting up this defense, so that at the time this defense was pleaded by the defendant the plaintiff had complied with the statute. The defense pleaded by the defendant was therefore unavailing to him to prevent the plaintiff from thereafter maintaining the action. Section 299, Civ. Code, does not declare that the plaintiff shall not commence an action in any county unless it has filed a certi-

fied copy in the office of the county clerk, but merely declares that it shall not maintain an action until it has filed it. To maintain an action is not the same as to commence an action, but implies that the action has already been commenced.' * * * In *Ryan Live Stock & Feeding Co. v. Kelly*, 81 Pac. 470, decided August, 1905, by the Supreme Court of Kansas, the same question was raised as in the case at bar, and the court there say: 'The plaintiff in this case is a private foreign corporation, and it was conceded upon the trial that it had not at the commencement of the action complied with the corporation laws of the state of Kansas; but it was proven that prior to the trial in the case it had complied therewith, and had received a certificate from the Secretary of State evidencing that fact. The sole question presented in this case is whether the corporation, not having filed a statement and procured the certificate required by law before the commencement of the action, could comply with the law thereafter, and maintain the action. The court below decided this question in the negative, and dismissed the action. Its judgment is reversed.' "

"After the commencement of the suit, and before trial, the plaintiff fully complied with all the requirements of our statutes, and established an agency and place of business in the state. If, therefore, it could be held that the transaction under consideration came within the inhibition of the statutes, said subsequent compliance would entitle plaintiff to maintain this action. The statute prohibits the prosecution or defense of an action 'until the fee shall have been paid,'

foreign corporation shall within a specified time after commencing to do business in the state designate a person residing in the county in which the principal place of business is situated, upon whom process may be served, and file such designation in the office of the secretary of state, and that every corporation which shall do business in the state without making and filing such designation, shall be denied the benefit of the statute of limitations, and shall not maintain or defend any action or proceeding in any court of the state, unless it shall have complied with the provisions of the statute, does not prohibit a foreign corporation from engaging in business in the state before filing the designation therein required, or affect the validity of any transaction it may enter into or any contract it may make. Neither does the provision that it shall not "maintain" any action in the courts of the state deny it the right at any time to commence an action for the protection of its property or the enforcement of its rights, as it is within the power of the corporation at any time after the commencement of the action to comply with the statute and thereafter "maintain" such action.⁸⁶

A contract made by a foreign corporation after the death or removal from the county of its agent for service of process and before it has appointed his successor has been held valid.⁸⁷

§ 5973. Construction of statutes imposing conditions. It is held that statutes requiring foreign corporations to do certain acts as a condition precedent to their right to do business in the state, and imposing certain penalties for noncompliance therewith are to be construed strictly.⁸⁸ Thus, under a statute denying to foreign cor-

and the prescribed certificate obtained. The prohibition is therefore only provisional, and may be removed at any time under the terms of the act itself. *Caesar v. Capell* (C. C.), 83 Fed. 403; *Asphalte Co. v. Mayor*, 155 N. Y. 373, 49 N. E. 1043; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *Ryan Live Stock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470. * * * We think that the purpose of the statute is fully accomplished by an equal compliance with its requirements subsequent to the commencement of the action, and renders enforceable a contract theretofore unenforceable by reason of the

failure to comply therewith. For the foregoing reasons, the plaintiff was entitled to maintain this action, and the judgment and decree of the court below is therefore affirmed." *Godard, J.*, in *International Trust Co. v. A. Leschen & Sons Rope Co.*, 41 Colo. 299, 14 Ann. Cas. 861, 92 Pac. 727.

⁸⁶ *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

⁸⁷ *House v. Bank of Lewisport*, 178 Ky. 281, 198 S. W. 760.

⁸⁸ *Arkansas. St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350.

California. Winston v. Idaho Hard-

porations doing business in the state the right to maintain an action in any of the courts of the state upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed it had filed its articles of incorporation as required by the statute, it was held that the statute declared and limited the penalty of noncompliance, and having done so, the penal consequences could not be extended beyond the boundaries so defined, and that one asserting as a defense the default of the foreign corporation in compliance should be held to the same strictness in pleading as is required of one claiming a statutory penalty.⁸⁹ Also a proviso which is an exception to the body of a statute imposing conditions upon the doing of business within the state by foreign corporations and which excepts certain corporations from the operation of the statute must be strictly construed.⁹⁰ A statute providing that if any foreign corporation shall fail to comply with its requirements, all contracts with citizens of the state shall be void as to it and shall not be enforced in its favor by the courts is construed as declaring and limiting the penalty of noncompliance and the penal consequences cannot be ex-

wood Co., 23 Cal. App. 211, 137 Pac. 601.

Illinois. Journal Co. of Troy v. F. A. L. Motor Co., 181 Ill. App. 530; Chicago & M. Tel. Co. v. Type Tel. Co., 137 Ill. App. 131, aff'd 236 Ill. 476, 86 N. E. 107.

Michigan. Young v. Moore, 162 Mich. 60, 127 N. W. 29; People v. Crucible Steel Co. of America, 150 Mich. 563, 114 N. W. 350.

New York. Greene v. Shain, 22 Misc. 720, 49 N. Y. Supp. 1061.

Texas. Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417.

West Virginia. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37.

See also §§ 5941-5943, *supra*.

To invoke the application of such a statute to an action brought by a foreign corporation, it must be shown that the corporation in question is one doing business in the state. Thomas v. Remington Paper Co., 67 Kan. 599, 73 Pac. 909.

"The object of the Act of 1899 is to enable the state to control foreign corporations. Its provisions place no grievous burdens upon them. Its language is plain and requires no learned interpretation. It means exactly what it reads. It is for the legislative department to indicate and to control the public policy of the state; and when clearly indicated, as it is in this act, it becomes the duty of the courts to enforce and not to obstruct that policy. It is much more to the public benefit that the state control foreign corporations, than it is that a bill for merchandise shall be collected by the aid of our courts." United Lead Co. v. J. W. Reedy Elevator Mfg. Co., 124 Ill. App. 174, aff'd 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567.

⁸⁹ Keating Implement & Machine Co. v. Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417.

⁹⁰ Sherman Nursery Co. v. Augenbaugh, 93 Minn. 201, 100 N. W. 1101.

tended beyond the boundaries so defined, and only contracts with the citizens of the state are made void by the statute; contracts with foreign corporation and persons who are not citizens are not within the purview of the act.⁹¹

Where the statute imposing conditions precedent to the right of foreign corporations to do business within the state does not declare that contracts made in violation thereof shall be void, the tendency of the courts is to a construction maintaining the validity of the contract and holding that the only effect of such legislation in the state where it is enacted is to impose the prescribed penalties and the expressed disabilities.⁹² Thus where a constitutional provision prohibits a foreign corporation from doing business in the state without having a place of business with an authorized agent for the service of process, and without filing a copy of its charter with the secretary of state, and a statute requires foreign corporations to file with the secretary of state certain documents, appoint an agent and accept the provisions of the Constitution, and provides that any corporation failing to comply with such provisions shall not be entitled to the benefits of the laws of the state relating to corporations and that any person acting as the agent of a foreign corporation which shall do business in contravention of such statute shall be deemed guilty of a misdemeanor and shall be personally liable on all contracts made in the state by him for and in behalf of such corporation during the time that it remains so in default, it was held that a contract made in the state by a foreign corporation doing business therein without compliance with such constitutional and statutory provisions was not

⁹¹ *St. Louis, A. & T. Ry. v. Fire Ass'n*, 60 Ark. 325, 28 L. R. A. 83, 30 S. W. 350.

⁹² *United States. Iowa Lilloet Gold Min. Co., Ltd. v. United States Fidelity & Guaranty Co.*, 146 Fed. 437; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.

Arkansas. Woolfort v. Dixie Cotton-Oil Co., 77 Ark. 203, 113 Am. St. Rep. 139, 7 Ann. Cas. 217, 91 S. W. 306.

New Jersey. Alleghany Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724.

Utah. A. Booth & Co. v. Weigand, 80 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g 28 Utah 372, 79 Pac. 570.

West Virginia. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37.

Thus it is held in West Virginia that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not on that account be held absolutely void unless the statute expressly so declares, and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others. *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37.

void and that such a corporation had the right to maintain a suit thereon in the courts of the state.⁹³

A statute prescribing the terms and conditions upon which foreign corporations may be admitted to do business in the state and making such corporations subject to all the restrictions, requirements and duties imposed upon domestic corporations does not render the directors liable for a penalty imposed by another statute upon directors of domestic corporations failing to file an annual report.⁹⁴

⁹³ *A. Booth & Co. v. Weigand*, 30 Utah 135, 10 L. R. A. (N. S.) 693, 83 Pac. 734, rev'g 28 Utah 372, 79 Pac. 570. The court said: "Unless such an intention is clearly expressed in the statute the courts will not hold such contracts void or nonenforceable. They will not do so by implication from loose and indefinite language. * * * The state is authorized to enforce the statute and may do so by proper proceedings on its behalf. * * * That, together with the penalty imposed for its violation, no doubt was deemed sufficient by the legislature to accomplish the purpose of the statute, and it is not for the judiciary at the instance or for the benefit of private parties to inflict the additional and harsh penalty of forfeiture by striking down contracts and acts not evil in themselves, especially when, as here, the contract had been fully executed on the part of the corporation, and the consideration thereof accepted and retained by the citizen. * * * If the legislature intended to deny non-complying corporations the power or capacity to contract in this state, or to deny them the right to maintain an action in our courts upon contracts growing out of business conducted by them in this state, it well could have said so in terms of no uncertain meaning, and should not have left it to conjecture and speculation. Until the legislature has expressed such an intention in clear and express terms, or until such an intention is otherwise

clearly manifested, we may well presume no such consequences were intended; and we are neither authorized nor disposed to ingraft them upon a statute of such doubtful language and elastic meaning as is the clause referred to. The authorities all recognize that the purpose of these constitutional and statutory provisions is not designed or intended as a prohibition upon foreign corporations to contract in the state, to the extent of declaring such contracts void and non-enforceable. Until the legislature shall do so, we are unwilling to give the citizen the right to discharge an innocent contract made by him with a noncomplying corporation and to avoid his obligation thereon or to prohibit its enforcement, especially when, as here, the contract on the part of the corporation is fully executed and the citizen has received and retained the consideration thereof, merely upon the ground that the corporation failed to perform 'a duty that it owed to the state at large, but the nonperformance of which in no manner prejudiced him.' *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544."

⁹⁴ *Young v. Moore*, 162 Mich. 60, 127 N. W. 29, following *National Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008, and distinguishing *Nelson v. Bank of Fergus County*, 157 Fed. 161, 13 Ann. Cas. 811; *Miller v. Quiney*, 179 N. Y. 294, 72 N. E. 116, and *Starkweather & Shepley v. Brown*, 25 R. I. 142, 55 Atl. 201.

§ 5974. **Substantial compliance with conditions.** Where a corporation has made an honest effort to comply with a statute prescribing conditions precedent to the right of a foreign corporation to do business in the state and a compliance has been had so far as it was possible, an action brought by such corporation in the state will not be dismissed because of the technical insufficiency of the compliance with the statute.⁹⁵ And if the foreign corporation has substantially complied with the conditions imposed by the statute, the failure of the official charged by the statute with the performance of certain duties to perform the same and thus complete the requirements of the statute will not affect the validity of contracts entered into by the corporation in the state.⁹⁶ But where the statutes of a state requiring foreign corporations to do and perform certain acts are mandatory, they must receive substantial compliance before such corporations will be allowed to maintain their actions in the state to enforce contracts entered into prior to their compliance with the law.⁹⁷

§ 5975. **Alleging and proving compliance with statutory conditions.** The questions of the necessity and sufficiency of allegations of a foreign corporation's compliance with statutory conditions and the burden of proof and presumption as to such compliance are discussed in a later section.⁹⁸

A license or certificate issued by a public officer to a foreign corporation, in pursuance of a statute, authorizing it to do business in the state, is at least *prima facie* evidence that the corporation has

⁹⁵ *Jordan v. Western U. Tel. Co.*, 69 Kan. 140, 76 Pac. 396.

⁹⁶ *American Ins. Co. v. Butler*, 70 Ind. 1.

⁹⁷ *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049.

Where a foreign corporation, at the time it entered into a contract, had filed its designation of agent and principal place of business as required by statute and had filed a copy of its articles of incorporation with the secretary of state, duly certified to by the secretary of state of the territory where the corporation was organized, but such copy was not certified to by

the county recorder of any county of the state with whose laws the foreign corporation sought to comply, as required by such laws, and no certified copy of its articles of incorporation had been filed with any recorder of any county of the state, it was held that the corporation had failed to comply substantially with the requirements of the statute and that therefore it could not maintain an action to enforce any contract entered into by it while thus in default. *Tarr v. Western Loan & Savings Co.*, 15 Idaho 741, 21 L. R. A. (N. S.) 707, 99 Pac. 1049.

⁹⁸ See § 5997, *infra*.

complied with the law,⁹⁹ unless the contrary appears on its face.¹

Under a statute providing that if the secretary of state is satisfied that a foreign corporation has complied with all the provisions of the statute regulating the right of foreign corporations to do business in the state and is entitled to do business therein, he shall issue his certificate stating such compliance and that it is entitled to do business accordingly, it is held that where by stipulation of the parties to an action a certificate of the secretary of state, showing that all the provisions of the statute authorizing corporations of a kind similar to the plaintiff corporation to do business in the state had been complied with by it was offered and admitted in evidence, subject to any valid objection thereto, and no objection was urged to the competency or relevancy of such certificate, it was adequate to establish, *prima facie*, at least, the authority of the plaintiff corporation to do business in the state.² Under a statute providing that before any foreign corporation shall begin to do business in the state it shall file in the office of the secretary of state a certificate stating the location of its principal place of business in the state and designating an agent upon whom process against it may be served, and that any foreign corporation which had prior to the enactment of such statute engaged in business within the state, might, within a prescribed time, file such certificate, and thereupon all contracts previously made by it should be validated, it was held that noncompliance with the statute was not shown by the mere production of a certificate which was defective, as there might have been another certificate of appointment which was in accordance with the requirements of the statute, and that it was for the defendant to show that the proper certificate was not filed in the office of the secretary of state, for until the contrary was

⁹⁹ *Gutzeit v. Pennie*, 95 Cal. 598, 30 Pac. 836; *Strasbaugh v. Steward Sanitary Can Co.*, 127 Md. 632, 96 Atl. 863; *American Ins. Co. v. Smith*, 19 Mo. App. 627, 73 Mo. 368; *Washington Nat. Building, Loan & Investment Ass'n v. Stanley*, 38 Ore. 319, 58 L. R. A. 816, 84 Am. St. Rep. 793, 63 Pac. 489.

In a prosecution against a foreign corporation for carrying on business in the state without complying with its laws respecting foreign corporations, it was held that a certificate filed by it in the office of the secretary of state, which was a declaration by

it of its corporate existence, a fact to be proven against it, was admissible to prove that fact, and while not the strongest possible assurance of its existence as a foreign corporation, was not secondary evidence of the incorporation. *Knoxville Nursery Co. v. Com.*, 21 Ky. L. Rep. 1483, 55 S. W. 691.

¹ *Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray (Mass.) 165.

² *Washington Nat. Building, Loan & Investment Ass'n v. Stanley*, 38 Ore. 319, 58 L. R. A. 816, 84 Am. St. Rep. 793, 63 Pac. 489.

shown, it would be presumed that the plaintiff corporation had fully complied with the law.³

Where the statute does not invalidate contracts made in the state by a corporation which has not complied therewith; it is not error to refuse to admit in evidence a certificate of the officer, in whose office documents necessary to compliance are required by the statute to be filed, setting forth that such corporation has not filed such document in his office.⁴

That a foreign corporation has complied with the conditions prescribed by a statute, regulating its right to do business in the state, cannot be shown by parol evidence.⁵ Noncompliance with the conditions prescribed for the doing of business by foreign corporations within the state cannot be shown by the testimony of a party who is not the custodian of the corporate records of the state that he has examined the files in the office of the custodian and has not found any record indicating that a certain foreign corporation has complied with such conditions.⁶

§ 5976. Asserting noncompliance with statute on appeal. On an appeal from a judgment in favor of the plaintiff, ordinarily the objection cannot be raised for the first time that the plaintiff foreign corporation has failed to comply with the statutory conditions precedent to its right to maintain an action in the state.⁷

³ Sidway v. Harris, 66 Ark. 387, 50 S. W. 1002.

⁴ North Mercer Natural Gas Co. v. Smith, 27 Ind. App. 472, 61 N. E. 10.

⁵ Pattison v. Gulf Bag Co., 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

"It must be readily conceded that unless the statutes of this state directed the secretary of state to grant to a foreign corporation a certificate of authority to do business in this state, such authority must be proved, when called in question, by the introduction of the documents on file in the office of the secretary of state showing compliance with the laws of the state, for it is well settled that the existence and contents of documents in the custody of a public officer cannot be proved merely by the officer's certificate of contents. On

the other hand, it seems equally clear that if the statutes of the state which prescribe the terms upon which corporations shall do business in the state direct the issuance by the secretary of state of a certificate of authority to do business, then such certificate is the best evidence of such authority, and must be received in evidence by the courts when the right of a corporation to do business here is called in question." J. R. Watkins Medical Co. v. Martin, 132 Ark. 108, 200 S. W. 283.

⁶ El Paso & S. W. R. Co. v. Kelly, (Tex. Civ. App.), 83 S. W. 855.

⁷ Wetzel & T. Ry. Co. v. Tennis Bros. Co., 145 Fed. 458, 7 Ann. Cas. 426; Standard Oil Co. v. Holmes' Estate, 82 Ill. App. 476, aff'd 183 Ill. 70, 55 N. E. 647; City Trust, Safe Deposit

§ 5977. Actions to recover penalties for violation of statutes. As will be seen elsewhere, statutes regulating the right of foreign corporations to do business in the state frequently impose a special penalty for the failure of a foreign corporation doing business in the state to comply with certain conditions precedent to its right to do business therein.⁸

Whether the business in which the corporation has engaged is intrastate business or only interstate commerce business is one of fact to be determined by the proper tribunal.⁹ Where there is any evidence tending to show that the corporation had engaged in business in the state the question of whether or not it had so engaged in business should be submitted to the jury.¹⁰

Where a statute provides that any foreign corporation doing business in the state which shall fail or refuse to comply with its requirements shall be subject to a fine of not less than one thousand dollars, a penalty in excess of the minimum amount prescribed by the statute may be imposed.¹¹

& Surety Co. of Philadelphia v. Wilson Mfg. Co., 58 N. Y. App. Div. 271, 68 N. Y. Supp. 1004; Barcus v. J. I. Case Threshing Mach. Co., — Tex. Civ. App. —, 197 S. W. 478.

See further, as to this question, § 5999, *infra*.

Where a foreign corporation doing business in a state cannot maintain a suit without alleging and proving that it has a permit to do business in the state, it is held that the question whether it has obtained such permit can be made for the first time in a court of review. See *Mansur & Tebbetts Implement Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972.

⁸ See *Finlay Brewing Co. v. People*, 111 Ill. App. 200; *Larkin Co. v. Com.*, 172 Ky. 106, 189 S. W. 3; *Com. v. Parlin & Orendorff Co.*, 118 Ky. 168, 80 S. W. 791; *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45.

See also § 5943, *supra*.

In Kentucky in an action by the state against a foreign corporation to recover the penalty for engaging in business in the state without filing a certain statement as required by a

statute of the state, it was held that a recovery of the penalty might be had if it was shown that the foreign corporation had engaged in business in the state, and that it was not necessary for the state to show that the statement had not been filed by the foreign corporation, but the duty of showing a compliance with the statute by the filing of the required statement rested on the defendant. *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45.

In such a prosecution neither a written answer nor a reply to such answer if filed, is required, but only a plea of not guilty is necessary. *Larkin Co. v. Com.*, 172 Ky. 106, 189 S. W. 3.

⁹ *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45. See § 5784, *supra*.

¹⁰ *Com. v. Read Phosphate Co.*, 113 Ky. 32, 67 S. W. 45. See § 5784, *supra*.

¹¹ *Western U. Tel. Co. v. State*, 82 Ark. 309, 12 Ann. Cas. 82, 101 S. W. 748. McCulloch, J., said: "The section of the statute which fixes the penalty is peculiarly phrased in that it

An action to recover the penalties imposed by a statute for the failure by a foreign corporation to comply with certain conditions precedent to its right to do business in the state is a civil suit and not a criminal proceeding, and, therefore, a federal court, sitting as a court of chancery has jurisdiction to enjoin actions for the recovery of such penalties.¹² Such a suit to enjoin the institution or prosecution of an action for the penalties imposed by the statute for its violation cannot, however, be maintained, as it is an action against the state, and for that reason within the prohibition of the Eleventh Amendment to the Constitution of the United States.¹³

Under a statute providing that if a foreign corporation shall fail to comply with the statutory requirements prerequisite to its right to do business in the state it shall be the duty of the secretary of state to report such fact to the prosecuting attorney of the county in which the business of such corporation shall be located, and thereupon the prosecuting attorney shall institute proceedings to recover the statutory penalty imposed for noncompliance, such a report is a condition precedent to such proceedings by the prosecuting attorney.¹⁴

§ 5978. Business which may be transacted by foreign corporation complying with statutory requirements. When a statute provides that any foreign corporation upon compliance with certain statutory requirements shall have power to transact every kind of business in the state in the same manner and to the same extent as domestic corporations, it is held that the mere filing by a foreign corporation of its articles of incorporation in compliance with the statute authorizes the corporation to transact all the business named therein not

prescribes only a minimum penalty, failing to prescribe the maximum. This, however, does not render the penalty feature of the statute invalid and the trial court or jury could assess a penalty in excess of the minimum amount prescribed by the statute. * * * *Frese v. State*, 23 Fla. 267, 2 So. 1; *In re Yell*, 107 Mich. 228, 65 N. W. 97."

Under a statute providing that every corporation amenable to its provisions which should neglect or fail to comply with any of the requirements of the statute, should be subject to a penalty of not less than one thousand dollars nor exceeding ten thou-

sand dollars, to be recovered by the state in any court of competent jurisdiction, a verdict for eight thousand dollars was held to be excessive when the corporation had done business in the state in violation of the statute for but a short period, and the case was reversed on this ground. *Finlay Brewing Co. v. People*, 111 Ill. App. 200.

¹² *Western U. Tel. Co. v. Andrews*, 154 Fed. 95.

¹³ *Western U. Tel. Co. v. Andrews*, 154 Fed. 95.

¹⁴ *State v. Kettle River Co.*, 214 Fed. 71.

expressly prohibited by law.¹⁵ A foreign corporation does not merely by its compliance with the laws of the state regulating the right of foreign corporations to do business therein, become entitled to carry on in the state a business which no one can engage in without securing from the state a license to carry on such business.¹⁶

§ 5979. Change in name after compliance with conditions. Where a foreign corporation has complied with the requirements of a statute regulating its right to do business in the state, and is granted a permit to do business in the state for a period of ten years, the fact that thereafter and during such period it changed its name, but made no other change in its charter, in the character of its business or the management thereof, does not necessitate its procuring a new permit, and the permit granted to it under its old name will inure to its benefit under the new name and authorize it to transact business in the state in its corporate capacity during the period covered by the permit.¹⁷ Where a foreign corporation in compliance with a statute of the state has appointed an agent to accept and receive service of process in the state, and subsequently changes its corporate name, the corporation remaining, however, the same artificial being, such change of name does not necessitate the appointment of another agent for such purpose.¹⁸

XVI. PROCEEDINGS TO EXCLUDE FOREIGN CORPORATIONS

§ 5980. In general. Where a foreign corporation violates the laws of a state in which it is doing business, it cannot complain of the procedure which the state has adopted to determine whether it has abused the courtesy shown it, and has thereby forfeited a continuance of it.¹⁹

¹⁵ *State v. Nichols*, 47 Wash. 117, 91 Pac. 632.

As to the powers of a foreign corporation, see subd. III, supra.

¹⁶ *E. A. Strout Co. v. Howell*, 4 Boyce (Del.) 31, 85 Atl. 666.

¹⁷ *St. Louis Expanded Metal Fire Proofing Co. v. Beilharz* (Tex. Civ. App.), 88 S. W. 512. See § 747, supra.

¹⁸ *Cable Co. v. Rathgeber*, 21 S. D. 418, 113 N. W. 88. See *People v. Hugo*, 181 N. Y. App. Div. 149, 168 N. Y. Supp. 80, for construction of

N. Y. Gen. Corp. Law, § 6, as amended by Laws 1911, c. 368.

¹⁹ *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565. The court said: "In what has been said we have assumed that foreign corporations doing business in the state are entitled to the same status and rights as domestic corporations; and in truth they are so entitled under the act in question (chapter 140, Acts of 1903), in respect of proceedings to stop them from doing business here,

The state grants it a privilege which it may revoke at pleasure, and when it exercises its franchises in contravention of its laws, that privilege may be revoked, and when the fact is ascertained, judgment may be rendered excluding it from the state. The revocation of a permission given to a foreign corporation to do business in a state is not an infliction of a penalty; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense.²⁰

As a general rule, when a foreign corporation engages in business in a state in violation of a statutory prohibition, or without complying with conditions precedent prescribed by the statutes of the state or engages in transactions contrary to public policy, the proper

and it seems from the authorities cited that they have been treated with the same consideration in many other states. But it is well to remember, and to remark, that they have no contract rights with the state. They are here merely on sufferance, guests, as it were, of the state, and have no right to complain of the procedure which the state has adopted to try the question whether they have abused the courtesy shown them, and have thereby forfeited a continuance of it."

²⁰ *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413, citing *Miles v. State*, 53 Neb. 305, 73 N. W. 678, and *Martin v. State*, 23 Neb. 371, 36 N. W. 554.

"It certainly cannot be contended in the light of the authorities that where a foreign corporation is doing business in a state merely through comity or acquiescence or even under a license given without valuable consideration there is a contract binding the state not to exercise its power to exclude. It is true that if the entry into the state was under a statute prescribing certain terms and conditions which were met and in return for which the corporation was given

the right for a certain time to do business in the state a contract would arise that might not be violated by the state. Such was the holding in *American Smelting Co. v. Colorado*, 204 U. S. 115, 51 L. Ed. 393. We are not cited to any contract or action under any statute having the force of a contract by or under which the appellee was originally admitted or permitted to continue in business in the state." *State v. Louisville & N. R. Co.*, 97 Miss. 35, Ann. Cas. 1912 C 1150, 53 So. 454, 51 So. 918.

When a foreign corporation accepts a license permitting it to do business in a state other than that of its creation, it is an implied condition that it agrees to transact such business under and in obedience to the laws of the state granting such permission in the same manner as a domestic corporation should transact similar business, and that, if it violates the laws of the state, then it shall thereby forfeit its rights to such license, in the same manner that the domestic corporations will forfeit their charter rights by offending against the laws. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, citing *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552; *Hooper v. California*, 155 U. S. 647, 39 L. Ed. 297.

remedy to oust and exclude it from such state, is by information in the nature of quo warranto, unless some other remedy is prescribed by statute.²¹ In an original proceeding in quo warranto against a foreign corporation in the supreme court of a state the court has no jurisdiction to annul a contract entered into by such corporation in the state, where the jurisdiction of the supreme court is in quo warranto alone, as a grant of that jurisdiction does not authorize the joinder to a cause of action for ouster of another one for the amendment of a contract, merely because the subject-matter of the latter possesses incidental connection with the subject-matter of

²¹ **United States.** *Standard Oil Co. v. Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936, aff'g 218 Mo. 1, 116 S. W. 902; *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482.

Colorado. *Iron Silver Min. Co. v. Cowie*, 31 Colo. 450, 72 Pac. 1067.

Iowa. *State v. Omaha & C. B. Railway & Bridge Co.*, 91 Iowa 517, 60 N. W. 121; *State v. Fidelity & Casualty Ins. Co.*, 77 Iowa 648, 42 N. W. 509.

Kansas. *State v. Kansas City Stockyards Co.*, 94 Kan. 96, L. R. A. 1918 B 680, 145 Pac. 831; *State v. William J. Lemp Brewing Co.*, 79 Kan. 705, 29 L. R. A. (N. S.) 44, 102 Pac. 504; *State v. Kansas Natural Gas Co.*, 71 Kan. 785, 81 Pac. 506; *State v. American Book Co.*, 65 Kan. 847, 69 Pac. 563. See *State v. Topeka*, 31 Kan. 452, 2 Pac. 593.

Michigan. *Attorney General v. National Cash Register Co.*, 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420; *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868; *Secretary of State v. National Salt Co.*, 126 Mich. 644, 86 N. W. 124.

Minnesota. *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108.

Missouri. *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145; *State v. International Harvester Co. of America*, 237 Mo. 369, 141 S. W.

672; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

Nebraska. *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413. See *State v. Nebraska Distilling Co.*, 23 Neb. 700, 46 N. W. 155.

Ohio. *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 24 Am. St. Rep. 573, 31 N. E. 658; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 8 L. R. A. 129, 24 N. E. 392.

South Dakota. *State v. Central Lumber Co.*, 24 S. D. 136, 42 L. R. A. (N. S.) 804, 123 N. W. 504; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931.

Texas. See *Western U. Tel. Co. v. State* (Tex. Civ. App.), 121 S. W. 194.

See § 3224 et seq., supra.

Where a foreign corporation secures from the state the right to operate stockyards therein, and in addition thereto it engages in the business of a common carrier of freight, it may be ousted from the state. *State v. Kansas City Stockyards Co.*, 94 Kan. 96, L. R. A. 1918 B 680, 145 Pac. 831.

For a discussion of quo warranto and of the distinction between the remedy by writ of quo warranto and an information in the nature of quo warranto, see §§ 3216-3276, supra.

the former.²² In quo warranto the court has jurisdiction to review the action of a public officer in issuing a permit or certificate authorizing the corporation to do business in the state, for in granting a permit or certificate, officers act ministerially and not judicially.²³ In a proceeding of this character the court will not review the action of the charter board in refusing an application made to it by such corporation for permission to transact business in the state.²⁴

The proper judgment in quo warranto proceedings is not to oust the corporation from the franchise of being a corporation, or from any of the franchises conferred upon it by the law of its creation, but from the exercise of its franchises in the state where such proceeding is brought.²⁵ The authority to inquire by a proceeding in the

²² State v. American Book Co., 65 Kan. 847, 69 Pac. 563, dismissed American Book Co. v. Kansas, 193 U. S. 49, 48 L. Ed. 613.

"By omitting to prescribe other remedies, the legislature intended to leave the state free to enforce the statute by employing any of those which the common law furnishes (State v. Book Co., 69 Kan. 1, 8, 76 Pac. 411, 1 L. R. A. [N. S.] 1041), and every corporation failing to obtain a certificate of authority exposes itself to an action of quo warranto or injunction to prevent the further local exercise of corporate privileges and powers." Burch, J., in State v. Western Union Tel. Co., 75 Kan. 609, 90 Pac. 299.

²³ State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658. See also State v. Kansas Natural Gas Co., 71 Kan. 785, 81 Pac. 506; State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

²⁴ State v. Kansas Natural Gas Co., 71 Kan. 785, 81 Pac. 506.

²⁵ State v. Western Union Mut. Life Ins. Co., 47 Ohio St. 167, 8 L. R. A. 129, 24 N. E. 392; Wright v. Lee, 2 S. D. 596, 51 N. W. 706. See also § 3270, supra, and Iron Silver Min. Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067;

State v. Omaha & C. B. Railway & Bridge Co., 91 Iowa 517, 60 N. W. 121; State v. Fidelity & Casualty Co., 77 Iowa 648, 42 N. W. 509; State v. Kansas Natural Gas Co., 71 Kan. 785, 81 Pac. 506; State v. American Book Co., 65 Kan. 847, 69 Pac. 563; State v. Fidelity & Casualty Co., 39 Minn. 538, 41 N. W. 108; State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658; Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936.

"A state has the power of a sovereign to prohibit foreign corporations from exercising their franchises, carrying on their ordinary corporate business, within its borders; and when, in defiance of such prohibition, and contrary to our law, a foreign corporation does assume to exercise corporate franchises in a manner affecting public interests, quo warranto will lie for the purpose of determining the right in question, and of applying a remedy, although it is true that the courts of a state have no power to affect by their judgments the corporate existence of foreign corporations. We can restrain the exercise, within our own jurisdiction, of corporate franchises inconsistent with our own sov-

nature of quo warranto whether a corporation de facto, organized and acting under the laws of another state, is in all respects a legal and valid corporation belongs to the state by which it was created and to it alone, and if such state fails to institute proceedings to divest it of its assumed franchises, no one else can do so.²⁶ Under a statute providing the remedies formerly obtained by the writ of quo warranto or proceedings by information in the nature of quo warranto may be obtained by a civil action for the purpose of vacating the charter or articles of incorporation, or for annulling the existence of a foreign corporation, it is held that such civil action is available against a foreign corporation, and that "annulling the existence of a foreign corporation" must be taken to mean, in respect to a foreign corporation, annulling its existence and life within the limits of the state.²⁷ Where, in an original proceeding in quo warranto brought in the supreme court of a state against a foreign corporation for

ereignty, whether the corporation whose acts are in question be domestic or foreign." *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108.

While a foreign corporation cannot defend in an action against it in a state where its right to do business has been forfeited, yet it may have a legal existence elsewhere, as a distinction exists between the dissolution of a domestic corporation and the forfeiture on the part of a foreign corporation of its right to do business in the state. *Rowe v. Stevens*, 25 Idaho 237, 137 Pac. 159.

²⁶ *Hudson v. Green Hill Seminary Corporation*, 113 Ill. 618. See §§ 5791, 5793, 5808-5820, *supra*.

²⁷ *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931. *Kellam, J.*, said: "The jurisdiction of our courts, prior to the enactment of these sections, to control foreign corporations within the state by quo warranto proceedings, can hardly be questioned; and it is expressly enacted that if there were such remedy by quo warranto, it might now be obtained by civil action. True, the purpose of the action is to 'annul the existence of the corporation,' but

that must be taken to mean its existence within this state. Whenever it attempts illegally to come into this state, and live, and exercise the functions of a living corporation, it may be proceeded against in this civil action, and its existence within this state annulled. The Ohio statute is similar to ours, but it has not, like ours, an authoritative declaration of its intended scope, and it is held to apply to foreign and domestic corporations alike. *State v. Western Mut. Life & Accident Society*, 47 Ohio St. 167, 24 N. E. Rep. 392, 8 L. R. A. 129. But, even if appellant were clearly right upon both these minor questions, the merits of this controversy upon the major question of whether the validity of the executed acts of a foreign corporation may be investigated and settled in a collateral proceeding for that purpose, remains unaffected; for, with the statute authorizing a civil action repealed, quo warranto proceedings would still remain, and, as suggested in *People v. Association*, *supra*, are entirely adequate for the maintenance of the authority of the state against a usurping corporation, whether foreign or domestic."

transacting business in the state without having procured from the superintendent of insurance a certificate of authority to do business in the state, the defendant filed an answer alleging full compliance on its part with the laws of the state notwithstanding the refusal of the superintendent of insurance to issue such permit, but subsequently by leave of court withdrew such answer and filed an amended and supplemental answer tendering costs and alleging that it ceased to transact insurance business in the state, it was held that the proper order to be entered was not an order of dismissal, but a judgment ousting the defendant from the exercise of its corporate powers in the transaction of insurance business in the state until duly authorized to do so in accordance with the laws of the state by the superintendent of insurance.²⁸

A state can also resort to its court of equity to enjoin the continued prosecution of a business sought to be conducted within the state by a foreign corporation in violation of the public policy of the state, and it is not incumbent upon it to remain inactive and be content with the recovery of penalties after they have been incurred.²⁹ So in some jurisdictions the attorney general may proceed against a foreign corporation by a suit in equity for an injunction to restrain it from doing business in the state and exclude it therefrom, where it engages in business in the state without complying with conditions precedent prescribed by the statutes of the state or in violation of a statutory prohibition, or engages in transactions in contravention to the public policy of the state.³⁰ A foreign corporation cannot escape

²⁸ *State v. Mutual Life Ins. Co.*, 59 Kan. 772, 51 Pac. 881, Johnson, J., dissenting. The court said: "It will be observed, as the pleadings now stand, the defendant neither denies that it was transacting business in violation of law at the time the action was commenced, nor disclaims a right or a purpose to again resume its business in Kansas as soon as this action is determined. It merely says it is not now violating the law. In this state of the pleadings the state is entitled to such judgment as the facts stated in the petition warrant. The amended and supplemental answer states no defense. * * * The temporary withdrawal from the state, does not dispose of the controversy. There is

nothing on record showing that the contention of the defendant, as exhibited in its original answer, that it was rightfully transacting business in Kansas, and may now lawfully do so, has been abandoned. A judgment against a corporation, ousting it from the exercise of corporate powers or franchises, is necessarily prospective in its operation. The very purpose of such an action is to prevent the future exercise of the privilege or authority wrongfully claimed."

²⁹ *State v. Louisville & N. E. Co.*, 97 Miss. 35, Ann. Cas. 1912 C 1150, 53 So. 454, 51 So. 918.

³⁰ *Illinois. North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423.

Louisiana. State v. American Sugar

from being bound by the acts of its agents performed in the state,

Refining Co., 138 La. 1005, 71 So. 137.

Massachusetts. Scollard v. American Felt Co., 194 Mass. 127, 80 N. E. 233.

Michigan. See Attorney General v. A. Booth & Co., 143 Mich. 89, 106 N. W. 868.

Mississippi. State v. Louisville & N. R. Co., 97 Miss. 35, Ann. Cas. 1912 C 1150, 53 So. 454, 51 So. 918.

Nebraska. See State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

Tennessee. State v. Standard Oil Co. of Kentucky, 120 Tenn. 86, 110 S. W. 565; State v. Schlitz Brewing Co., 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

Texas. See Wren v. Stanton Mercantile Co., — Tex. Civ. App. —, 140 S. W. 1145.

Neither the ancient writ of quo warranto nor the information in the nature thereof was ever in force in Tennessee; but the remedies for the accomplishment of the ends aimed at by those proceedings is attained by legislation conferring upon courts of equity power to grant relief upon a bill in equity to restrain a foreign corporation from doing business in the state and to oust it therefrom. State v. Standard Oil Co. of Kentucky, 120 Tenn. 86, 110 S. W. 565, citing State v. McConnell, 3 Lea (Tenn.) 332; State v. Cumberland Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390.

Under a statute which in its first section defines a trust, in its second section characterizes as misdemeanors and conspiracies against trade all acts by any person or persons carrying on, or creating, or attempting to create a trust, and provides punishment for the commission of such acts, in its third section declares that any domestic corporation which has violated the act shall forfeit its charter and may

be ousted from its franchises by quo warranto, and in its fourth section provides that every foreign corporation or person not a resident of the state violating any of the provisions of such act, is denied the right and prohibited from any business within the state, and it shall be the duty of the attorney-general, and each county attorney within his county, to enforce such provision by injunction, or other proper proceedings, in any county in which such foreign or nonresident does business, in the name of the state on his relation, it is held that sections 3 and 4 of the statute providing for ousting corporations by civil actions from the powers and privileges which have been abused are declaratory of the common law, and that a foreign corporation, by reason of having done one or more of the criminal acts mentioned in section 2 of the statute, may by injunction or quo warranto be excluded from the state. State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413. Sullivan, J., said: "It will be noticed that the second section of the law in plain terms prescribes penalties for the acts therein denounced as criminal. And it will also be observed that the third section provides a civil remedy on behalf of the state for the commission of these same acts. It is true that the forfeiture of the charter of a domestic corporation is a consequence of violating the law, but it is not a penal consequence. The proceeding by quo warranto is a civil remedy. It is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. * * * The fourth section is, in substance, like the third. It provides that a corporation domiciled in another state, may, by reason of having done one or more of the criminal

within the scope of their duty, because the conduct complained of for which the state is seeking to make it responsible and to enforce a forfeiture of its right to do business in the state on the ground that it is an alleged violation of the anti-trust laws of the state, involves a criminal responsibility in addition to their civil liability.³¹ Where a statute provides that if, upon examination of any domestic insurance company incorporated in the state, the superintendent is of the opinion that it is insolvent or that its condition is such as to render its further continuance in business hazardous to the insured therein or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded or is exceeding its corporate powers, he shall apply to the court for an injunction restraining such company, in whole or in part, from further proceeding with its business, and another statute provides that foreign corporations and the officers and agents thereof doing business in the state shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of the state, the superintendent of insurance may maintain a bill against a foreign insur-

acts mentioned in the second section, be excluded from the state. The attorney general is authorized to proceed against it by injunction or quo warranto. The latter remedy, which is included in the phrase 'other proper proceedings,' may, with propriety, be resorted to for the purpose of preventing a corporation created in one state from doing business in another contrary to law. * * * In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality. If sections 3 and 4 provide penalties for crime, they violate the Constitution, and are absolutely void, for they deny the right of trial by jury (Const. Art. 1, §§ 6, 11; *State v. Moores*, 56 Neb. 1, 76 N. W. 530), and the right to a trial on an indictment or information (Const. Art. 1, § 10). Furthermore, a corporation can violate the law only by transgressing section 2. That section declares the penal consequence of the transgression, and it would not be

competent for the legislature to add another penalty, and enforce each by a separate action. Const. Art. 1, § 12. The true construction of sections 3 and 4 is that they are merely declaratory of the common law, and that they provide for ousting corporations by civil action from the exercise of powers and privileges which have been abused. The action is no more criminal than is an action for damages resulting from the commission of a crime. * * * Section 4, so far as it relates to citizens of other states, is an unlawful discrimination in favor of the citizens of this state, and invalid in any view of the case." See also *People v. American Ice Co.*, 135 N. Y. App. Div. 180, 120 N. Y. Supp. 41, construing certain New York statutes regulating suits against foreign corporations violating the laws of the state.

³¹ *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, aff'd 177 U. S. 28, 44 L. Ed. 657.

ance company which has failed to comply with the statutory conditions precedent to its right to do business in the state in order to enjoin it from doing business in the state.³²

Under a statute providing that an action may be brought by a state's attorney in the name of the state against any corporation, when it is claimed that it has exercised or is exercising a franchise or privilege not conferred upon it by law, it is held that an action will lie against a foreign corporation to prevent it from doing business in the state in contravention of the laws thereof.³³

Under a statute providing that either the original permit given to a foreign corporation to do business within the state or certified copies thereof shall be evidence of compliance on the part of the corporation of its compliance with the conditions precedent to its right to do business in the state, and that a certificate of the secretary of state to the effect that the corporation named therein has failed to file its articles of incorporation in his office, shall be evidence that the corporation has not complied with such conditions, and under another statute providing that any foreign corporation which shall fail to pay the tax required to be paid by it within a specified time shall, because of such failure, forfeit its right to do business in the state, which forfeiture shall be consummated, without judicial ascertainment, by the secretary of state entering upon the margin of the ledger kept in his office, relating to such corporations, the word "forfeited," it is held that as neither of such statutes provides that the certificate of the secretary of state declaring that the right of a corporation to do business in the state has been forfeited shall be evidence of such forfeiture, his certificate to such effect is no evidence of that fact.³⁴

§ 5981. Power of legislature to prescribe causes for ouster. The legislature of a state has the power to determine what acts are sufficient to warrant the forfeiture of the permits of foreign corpora-

³² *North American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423.

³³ *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706.

The procedure allowed by Minnesota Laws 1907, c. 269, for revocation of the license of a foreign corporation, is not exclusive, and under the discretion vested in him, the attorney general may, in the name of the state, institute proceedings to have such license adjudged forfeited. *State v.*

Standard Oil Co., 111 Minn. 85, 126 N. W. 527.

³⁴ *St. Louis Expanded Metal Fire Proofing Co. v. Beilharz* (Tex. Civ. App.), 88 S. W. 512. The court said: "The legislature having thus restricted the use of the certificate of the secretary of state as evidence of matters pertaining to his office, the courts are not at liberty to extend the application of such statute to matters not expressly authorized thereby."

tions to do business within the state, and when it has determined by statutory enactment that the doing of such acts is sufficient to warrant such forfeiture, there is nothing left to the courts but the absolute duty to enforce such statute.³⁵ If the corporation is found guilty of an act of omission or commission which is expressly declared to be a cause of forfeiture of its franchise, clearly a court has no discretion to refuse such a judgment. In such case, as a mere matter of law, a court is bound to award a judgment of ouster. Neither mistake on the part of the corporation nor subsequent good behavior will disable the state from demanding such judgment.³⁶

As will be seen elsewhere, some of the statutes have adopted in reference to foreign corporations, doing business in the state, what is known as "retaliatory legislation."³⁷ Where such legislation obtains, it is held that a foreign corporation which has complied with the laws of the state should not, as a measure of retaliation, by force of the retaliatory statute be excluded from doing business in such state, upon the ground that the laws of the state where such foreign corporation was created would exclude corporations of the former state from doing business in the latter state, unless it is clearly apparent that such is the effect to the foreign law, and where it is doubtful, a judgment of ouster against the foreign corporation will be refused.³⁸ Thus where the statutes of a state do not directly prohibit foreign corporations from insuring against more than one of several kinds of specified risk, but do not restrict the operation of domestic corporations to one of such classes of risks, and it is doubtful whether the courts of such state will hold that a foreign corporation engaged in more than one of such several classes of insurance cannot do business in such state, the courts of another state

³⁵ State v. Central Lumber Co., 24 S. D. 136, 42 L. R. A. (N. S.) 804, 123 N. W. 504. See also King-Tonopah Min. Co. v. Lynch, 232 Fed. 485; Scollard v. American Felt Co., 194 Mass. 127, 80 N. E. 233; State v. Creamery Package Mfg. Co., 110 Minn. 415, 136 Am. St. Rep. 514, 126 N. W. 126, 623; State v. Standard Oil Co., 218 Mo. 1, 116 S. W. 902; State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; Waters-Pierce Oil Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936, aff'd 177 U. S. 28, 44 L. Ed. 657.

³⁶ State v. Standard Oil Co. of Kentucky, 120 Tenn. 6, 110 S. W. 565; State v. Cumberland Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390.

³⁷ See §§ 5759, 5910, 5950, *supra*.

³⁸ State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108; Griesa v. Massachusetts Benefit Ass'n, 60 Hun (N. Y.) 581, 15 N. Y. Supp. 71, aff'd 133 N. Y. 619, 30 N. E. 1146; State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658.

where retaliatory legislation in reference to foreign corporations obtains will not oust a corporation from doing business in such state.³⁹

A foreign corporation accepts its license admitting it to do business in the state, subject to the proper exercise by the state of its police power, and if such a corporation violates a valid law of the state enacted after its admission, the license so issued may be adjudged forfeited.⁴⁰ Under a statute providing for the issuance of a license to a foreign corporation authorizing it to do business in the state, and also for the forfeiture of the permit of any foreign corporation which may violate any of the provisions of the statute, the forfeiture of the permit does not violate any contract obligation, as the provision of the law in respect to the forfeiture was as much a part of the obligation and as binding upon the corporation as if it had been expressly made part of the permit.⁴¹

A statute providing that where a foreign corporation doing business within the state shall for a specified time fail to pay a tax lawfully assessed and payable, any court having jurisdiction in equity may upon petition of the collector of taxes, restrain such corporation from doing business in the state until such tax is paid, and that service of process upon such petition may be made by an officer duly qualified to serve process, by leaving a duly attested copy thereof at the place where the business is carried on, is constitutional.⁴²

A wrongful act which, if committed by a domestic corporation, would render it liable to a forfeiture of its corporate existence, will

³⁹ *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108.

⁴⁰ *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 136 Am. St. Rep. 514, 126 N. W. 126, 623.

"It is obvious that the power of the state to enact legislation similar to that of the statute in question must be referred to the power to promote the convenience of the people of the state, and it has been frequently decided that the enforcement of statutes enacted under the police power, forfeiting the right of foreign corporations to continue in business in a state, although disastrous in consequences to the corporation, is not depriving

them of property without due process of law. * * * Whatever limits there are to the power and sovereignty of a state in excluding or controlling foreign corporations, those limits cannot be fixed or measured solely, by the volume of their business, or the nature and amount of their investments." Alexander, J., in *State v. Louisville & N. R. Co.*, 97 Miss. 35, Ann. Cas. 1912 C 1150, 53 So. 454, 51 So. 918.

⁴¹ *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657. See § 5757, supra.

⁴² *Scollard v. American Felt Co.*, 194 Mass. 127, 80 N. E. 233.

render a foreign corporation liable to a forfeiture of its franchise to do business in the state whose laws it has violated.⁴³

Where a foreign corporation commits acts which are forbidden by its charter or by a general rule of law, and that act is dangerous to the public, it may be sufficient ground for the state to ask for a revocation of license to do business within the state.⁴⁴

§ 5982. Ouster for violation of anti-trust or criminal laws. A foreign corporation may be excluded from the state by quo warranto proceedings or, in some jurisdictions, by injunction, by the reason of its having done one or more of the criminal acts mentioned in the anti-trust laws of the state.⁴⁵ A statute prohibiting trusts, monopolies and conspiracies in restraint of trade and declaring them illegal and

⁴³ *State v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527.

⁴⁴ *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137.

⁴⁵ *United States. Standard Oil Co. v. Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936, aff'g 218 Mo. 1, 116 S. W. 902; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657, aff'g 19 Tex. Civ. App. 1, 44 S. W. 936.

Louisiana. State v. American Sugar Refining Co., 138 La. 1005, 71 So. 137.

Michigan. Attorney General v. National Cash Register Co., 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420; *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

Missouri. State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145; *State v. International Harvester Co. of America*, 237 Mo. 369, 141 S. W. 672; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

Nebraska. State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

South Carolina. State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

Tennessee. State v. Standard Oil Co. of Kentucky, 120 Tenn. 86, 110 S. W. 565; *State v. Schlitz Brewing Co.*, 104

Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

Texas. Pierce Oil Corp. v. Weinert, 106 Tex. 435, 167 S. W. 808; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, aff'd 177 U. S. 28, 44 L. Ed. 657.

As to the constitutionality of federal and state anti-trust acts, see §§ 3387, 3388, *supra*.

See, for dissolution of combinations in restraint of interstate commerce and constituting a monopoly in violation of the Sherman Anti-Trust Act, § 3399, *supra*.

"Both articles 1 and 2 of chapter 143 declare pools, trusts, agreements, combinations, confederations, and conspiracies, formed and entered into by corporations for the accomplishment of the purposes therein specified, to be illegal. These statutes are a declaration of the policy of the state, the violation of which by a corporation is a violation of its pact, entered into with the state when it was chartered as a domestic company, or licensed to do business as a foreign company, which violations give the state the right to withdraw such charter rights or cancel such license privileges." *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 999, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

providing that when any foreign corporation has been convicted of a violation of any of the provisions of the act, and its right to do business in the state forfeited as provided by the statute, no other corporation, to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in the state, is not unconstitutional as providing for an attainder of property.⁴⁶ A foreign corporation which has purchased the property and business and assumed the payment of the obligations of a foreign corporation which has been convicted of a violation of such statute and ousted from the state is also prohibited from doing business in the state.⁴⁷

In some jurisdictions it is held that it is not necessary to the maintenance of an action to exclude a foreign corporation from the state for a violation by it of a criminal statute of the state that there should have been an antecedent conviction of the corporation in a court of law, but, of course, this is a matter frequently controlled by the statute alleged to have been violated by the foreign corporation.⁴⁸

§ 5983. By whom ouster proceedings can be maintained. Unless there is a statutory provision to the contrary, a proceeding to oust or exclude from the state a foreign corporation which engages in business in the state in violation of a statutory prohibition, or without complying with conditions precedent prescribed by the statutes of the state, or engages in transactions contrary to its public policy, is instituted by, and can only be instituted by, authority of the state. It cannot be instituted and prosecuted by private individuals, nor even by the attorney general, if he is acting solely on behalf of

⁴⁶ *Pierce Oil Corporation v. Weinert*, 106 Tex. 435, 167 S. W. 808.

⁴⁷ *Pierce Oil Corp. v. Weinert*, 106 Tex. 435, 167 S. W. 808.

⁴⁸ *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033. Caldwell, J., said: "The penalty whose enforcement is here sought is apart from, and independent of, a criminal conviction. It is prescribed in a different section of the act, is expressed in unconditional terms, and is entirely without dependent connection with either the criminal responsibility or the pecuniary

liability prescribed separately in the other two sections, respectively. Any court having jurisdiction to enforce any penalty or remedy provided for in the act was obviously intended to have, and manifestly has, jurisdiction, also, to first adjudge the fact of violation, on which the enforcement must ultimately find its support and justification."

See *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

private individuals, and not ex officio on behalf and by authority of the state.⁴⁹

§ 5984. Judgment of ouster discretionary. To warrant the judgment of ouster against a foreign corporation there must have been a wilful or improper act or neglect, such as to work or threaten a substantial injury to the public.⁵⁰ In a proceeding by the state to oust a foreign corporation from doing business in the state without complying with the laws of that state, judgment of ouster will not be awarded if the corporation shall comply with such law in a reasonable time.⁵¹ And it has been held that a foreign corporation will not be ousted from its privilege of doing business in the state for failure to comply with statutory conditions precedent and obtain a permit, where the failure was caused by a bona fide belief that no permit was necessary; but in such case the corporation will be given an opportunity to comply with the statute and continue business.⁵² Where a foreign corporation is transacting business under a license

⁴⁹ See § 3237 et seq., supra. See also *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922; *State v. American Book Co.*, 69 Kan. 1, 1 L. R. A. (N. S.) 1041, 2 Ann. Cas. 56, 76 Pac. 411; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89; *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co.*, 8 N. M. 327, 43 Pac. 701.

⁵⁰ See generally §§ 3232, 3270, supra. See also:

Iowa. *State v. Omaha & C. B. Railway & Bridge Co.*, 91 Iowa 517, 60 N. W. 121.

Michigan. *Attorney General v. National Cash Register Co.*, 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420.

Missouri. See *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

Nebraska. See *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. (N. S.) 1123, 144 N. W. 795.

New York. *People v. Bristol & R. Turnpike Road Co.*, 25 Wend. 222, 236.

⁵¹ *Iowa Lillooet Gold Min. Co., Ltd. v. United States Fidelity & Guaranty Co.*, 146 Fed. 437; *State v. Omaha & C. B. Railway & Bridge Co.*, 91 Iowa 517, 60 N. W. 121; *State v. International Harvester Co.*, 237 Mo. 369, 141 S. W. 672; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, aff'd 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936; *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. (N. S.) 1123, 144 N. W. 795.

⁵² *State v. Omaha & C. B. Railway & Bridge Co.*, 91 Iowa 517, 60 N. W. 121. See also *Attorney General v. National Cash Register Co.*, 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420.

See *Wren v. Stanton Mercantile Co.*, — Tex. Civ. App. —, 140 S. W. 1145, holding that the cancellation of the permit of a foreign corporation to do business in the state and an injunction restraining it from so doing business, but not from disposition of its property, or liquidating its business or collecting its debts, did not constitute a defense to an action on notes given to it for the sale of goods shipped by

granted by the state, and violates the anti-trust laws of the state, the license and right to prosecute business within the state may be forfeited and set aside and such corporation wholly ousted from the state or it may be prohibited from engaging in specific practices which are contrary to the laws of the state.⁵³ Where, in such a case, the corporation has by its conduct become liable to a complete ouster, the court may in its discretion make a limited or qualified order of ouster prohibiting certain specific acts and retain jurisdiction, and control of the parties for the purpose of making further orders in the premises, should just and proper cause arise therefor in the future.⁵⁴

§ 5985. Restriction of judgment of forfeiture to matters of intra-state commerce. As has been seen heretofore, except where the foreign corporation is in the employ of the federal government or is engaged strictly in matters of interstate commerce, such a body is entitled to no rights or privileges except such as may be conferred upon it as an act of grace by the state other than that of its creation in which it does business.⁵⁵

If an anti-trust statute which a foreign corporation is charged with having violated has no application to transactions of interstate commerce, but is applicable to domestic commerce and transactions occurring within the limits of the state, the court, in rendering its judgment canceling and forfeiting the permit given such corporation to do business in the state, may provide that it shall not relate to and interfere with the right of the corporation in dealing with matters of interstate commerce, but shall apply only to matters of intrastate commerce and transactions occurring within the state.⁵⁶

it into the state prior to such cancellation and injunction, but not sold by it in the state until afterwards.

⁵³ *State v. International Harvester Co. of America*, 81 Kan. 610, 106 Pac. 1053.

⁵⁴ *State v. International Harvester Co. of America*, 81 Kan. 610, 106 Pac. 1053.

⁵⁵ See §§ 5734, 5753, 5762-5784, *supra*.

⁵⁶ *Western U. Tel. Co. v. State* (Tex. Civ. App.), 121 S. W. 194; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, *aff'd* 177 U. S. 28, 44 L. Ed. 657. See also *Western*

U. Tel. Co. v. Frear, 216 Fed. 199; *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, *aff'd* 224 U. S. 270, 116 S. W. 902, *Ann. Cas.* 1913 D 936.

See, generally, Chap. 54, *supra*.

The generally inclusive terms of the Bush Act are to be interpreted with reference to the state's plenary power over its purely internal commerce, and over foreign corporations seeking to engage in such commerce, and, so interpreted, the law applies to all foreign corporations not engaged in interstate commerce or business for

A foreign corporation engaged in interstate commerce may be ousted from the franchise of doing local business, if it violates the conditions attached to the permission granted it to do business within the state.⁵⁷

the federal government, and to all foreign corporations engaged in interstate commerce or business for the federal government to the extent that they must comply with its requirements in order to engage in nongovernmental intrastate business. *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299.

The state of Texas brought an action to oust the Waters-Pierce Oil Company from doing business in that state on account of a violation of its anti-trust law, the penalty clause of which reads as follows: "Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceedings." The defendant was engaged in interstate commerce, but transactions of that character were withdrawn from the consideration of the jury and excepted from the judgment. It was claimed, however, that the statute was void as a regulation of interstate commerce. A judgment of ouster having been approved by the Texas Supreme Court, a writ of error was granted by the Supreme Court of the United States, which, in finally determining the controversy, said: "The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563, *Trade Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *United*

States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 32 L. Ed. 766, and some other cases are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and, the court finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation. The courts of Texas have like power of interpretation of the statutes of Texas. What they say the statutes of the state mean we must accept them to mean, whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts." *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657.

⁵⁷ *Western U. Tel. Co. v. Frear*, 216 Fed. 199; *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299.

See §§ 5981, 5984, *supra*.

For failure to comply with the law a foreign corporation engaged in interstate commerce and transacting business for the federal government may be ousted from the privilege of engaging in nongovernmental intrastate business. *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299.

A judgment of ouster from local nongovernmental business against the Western Union Telegraph Company because it had not complied with the statute of a state will not constitute a regulation of interstate commerce, or of government business, although the receipts at many offices from interstate and government business alone are not sufficient to keep them open. Nor does such judgment

§ 5986. Mandamus in case of noncompliance with statutory conditions. Mandamus will not lie to compel compliance with prescribed conditions by a foreign corporation, since it may prefer withdrawal from the state to compliance.⁵⁸

Where a statute of a state requires the secretary of state to revoke the license of a foreign corporation which has violated the conditions of its permit to do business within the state, mandamus will lie to compel him to revoke such license, and the supreme court of the state, when vested with original jurisdiction to issue a mandamus may compel him to make such revocation.⁵⁹

deprive the corporation of property without due process of law, although many of its offices must be closed and its poles and wires are not removable without great loss. *State v. Western U. Tel. Co.*, 75 Kan. 609, 90 Pac. 299. The court said: "In the case of *Waters-Pierce Oil Company v. Texas*, 177 U. S. 28, 44 L. Ed. 657, the state made it a condition upon the exercise by a foreign corporation of its corporate franchises within the limits of the state that it should not make certain kinds of contracts believed by the state to be inimical to the prosperity of its people. The penalty for a breach of the condition was exclusion from intrastate business. The company claimed that its unrestricted right to do interstate business drew to it the right to be unregulated concerning its local business, just as the defendant in this case claims the unconditional right to do local business in Kansas. In denying the legal validity of this claim the court went back to the decisions in *Augusta v. Earl*, 13 Pet. (U. S.) 519, 10 L. Ed. 274; *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650, and *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, and reasserted the doctrine they had established, that, since the states may exclude foreign corporations entirely, they may attach whatever terms and conditions

they choose to admission. In affirming a judgment of ouster as to intrastate business which, however, left the defendant free to carry on interstate commerce, the court said: 'The plaintiff in error is a foreign corporation; and what right of contracting has it in the state of Texas? This is the only inquiry and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the state over them. What those rights are and what that power is has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.' "

⁵⁸*Secretary of State v. National Salt Co.*, 126 Mich. 644, 86 N. W. 124. See also § 3307, *supra*.

⁵⁹*State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

The attorney general cannot be compelled by mandamus to institute quo warranto or other proceedings to forfeit the charter of a corporation.

§ 5987. Revocation of license for removal of cause. In a preceding section the validity of state statutes affecting the bringing of suits in federal courts or the removal of causes thereto by such corporations has been considered at length, and it has been seen that statutes which exact a waiver of the right of removal as a condition precedent to the granting of permission to do business have been held invalid, while statutes providing for the revocation of the license of a foreign corporation removing a cause have been sustained. Furthermore, revocation of a license on such a ground will not be allowed where the corporation's constitutional rights will be infringed or where the corporation is engaged in interstate commerce.⁶⁰

And it is now settled by a recent decision of the Supreme Court of the United States that a state official may be enjoined from enforcing a forfeiture of the right of a foreign corporation engaged in interstate commerce to do business in the state, incurred by reason of its assertion of the right to remove an action against it from a state to a federal court, where the statute provides that the license or charter of every corporation transacting business within the state shall be immediately revoked, if it shall claim or declare in writing before any court of law or equity within such state that its domicile is within another state or foreign country.⁶¹ So, also, he may be enjoined from revoking the license of a foreign corporation, engaged

State v. Attorney General, 30 La. Ann. 954; State v. Patterson & H. Turnpike Co., 21 N. J. L. 9. See, however, State v. Berry, 3 Minn. (Gil.) 190.

See, generally, as to mandamus, Chap. 50, supra.

⁶⁰ See § 5761, supra.

In *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, Chief Justice White said: "In the first place, the right, unrestrained and unpenalized by state action, on compliance with the forms required by the law of the United States, to ask the removal of a cause pending in a state to a United States court, is obviously of the very essence of the right to remove conferred by the law of the United States. In the second place, as the right given to remove by the United States law is paramount, it results that it is also of the essence of the right to remove,

that when an issue of whether a prayer for removal was rightfully asked arises, a federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power. In the third place, as the right freely exists to seek removal unchecked or unburdened by state authority, and the duty to determine the adequacy of a prayed removal is a federal and not a state, question, it follows that the states are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the federal right of removal on the ground that the removal asked was unauthorized or illegal."

⁶¹ *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, aff'g *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480.

in both intrastate and interstate business within the state, for its violation of a statute providing that whenever any foreign corporation shall remove or make application to remove into a federal court a cause commenced against it by a citizen of the state upon a cause of action arising within the state, it shall be the duty of the secretary of state to revoke the license of such corporation to do business within the state.⁶² An action to enjoin state officers from enforcing a forfeiture of the right of a foreign corporation, engaged in interstate commerce, to do business in the state, incurred by reason of its assertion of the right to remove an action against it from a state to a federal court is not a suit against the state.⁶³

On the other hand, a bill will not lie on behalf of a foreign insurance company to enjoin the insurance commissioner of a state from revoking its license to do business in the state on the ground that it had removed a cause brought against it in the state court to the federal court or to cancel the revocation of a permit already revoked on those grounds.⁶⁴

Although a statute prohibiting or restricting a foreign corporation from removing a suit into the federal courts as authorized by the acts of Congress on the subject may be void, neither a state nor a federal court, however, can by mandamus or otherwise compel a state officer to grant a permit to a foreign corporation not engaged in interstate commerce in such a case, or prevent by injunction the

⁶² *Donald v. Philadelphia & R. Coal & Iron Co.*, 241 U. S. 329, 60 L. Ed. 1027, aff'g 216 Fed. 199.

⁶³ *Donald v. Philadelphia & R. Coal & Iron Co.*, 241 U. S. 329, 60 L. Ed. 1027, aff'g 216 Fed. 199; *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, aff'g *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 54 L. Ed. 970; *Western U. Tel. Co. v. Julian*, 169 Fed. 166.

⁶⁴ *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 6 Ann. Cas. 317, aff'g 119 Ky. 321, 1 L. R. A. (N. S.) 1019, 115 Am. St. Rep. 264, 84 S. W. 527, 83 S. W. 611.

The case of *Security Mut. Life Ins. Co. v. Prewitt*, 200 U. S. 446, 50 L. Ed. 545, involved, however, the right of a state to deal with the business

of insurance—a matter purely of state concern involving interstate commerce in none of its aspects. *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378.

Where a foreign insurance company has voluntarily accepted a license to do business in a state, the laws of which provide that such license shall be revoked if the corporation remove an action instituted against it in the state courts to the federal courts, no foundation is laid for federal jurisdiction in an action in equity by the company to have the prosecution of a suit against it enjoined by the fact that under the provisions stated relative to the revocation of its license it has not the same control over an action brought against it as it would have over a suit which it might institute. *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 188.

cancellation of a permit theretofore granted, for the right of a state to exclude foreign corporations not engaged in interstate commerce is absolute, and the courts cannot inquire into its motive in so doing.⁶⁵ An application for prohibition brought by a foreign corporation, which is the defendant in an action in a state court, against the plaintiff in such action, the judge of such court and the secretary of state to prohibit the secretary of state from canceling the license of the foreign corporation on account of its removing such action from the state court to the federal court, and to prohibit the judge of the state court and the plaintiff in such action from taking any steps in the same, will be denied on account of misjoinder of parties.⁶⁶

As has been stated elsewhere, a foreign insurance corporation may remove to a federal court a suit brought against it in a state court, if the requisite jurisdictional facts exist, notwithstanding the statute of the state in which the suit is brought provides for a revocation of the license or permit of such corporation to do business in the state, if it removes to a federal court a suit brought against it in a court of the state.⁶⁷

§ 5988. Effect of revocation of license. The revocation of the license or permit of a foreign corporation to do business in a state cannot affect the validity of contracts made by it before the revocation, nor its right to maintain an action to enforce them.⁶⁸ If, after an action at law against a foreign corporation, rightfully doing business in the state, has been properly commenced, such corporation be deprived of its statutory privileges, the action may be prosecuted to judgment as effectually in all respects as if the defendant's right to do business in the state had not ceased.⁶⁹

⁶⁵ *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 6 Ann. Cas. 317; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

⁶⁶ *State v. Johnston*, 234 Mo. 338, 137 S. W. 595.

⁶⁷ See § 5761, *supra*; *Judson v. Knights of Maccabees of World*, 220 Fed. 1004; *Shawnee Fire Ins. Co. v. National Surety Co.*, 94 Kan. 305, 146 Pac. 412.

⁶⁸ See §§ 5757, 5961, *supra*.

⁶⁹ *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 W. Va. 696, 26

L. R. A. (N. S.) 1101, 66 S. E. 1073. *Poffenbarger, J.*, said: "The contract being valid and the jurisdiction having attached before the right to do business in the state was lost, we know of no principle upon which the defendant could defeat that jurisdiction by withdrawing from the state. Having once attached, it continued. The privilege taken away by the quo warranto proceeding was no greater than that granted by the statute upon compliance with the conditions therein named. That was the privilege of doing business in this state. Under the rule of comity, it had certain other

Contracts entered into by it after the revocation are invalid and unenforceable to the same extent as if a license had never been granted to it.⁷⁰ It has been said that the revocation of the license of a foreign corporation works a quasi dissolution of the foreign corporation, and it is in the same situation in the state as if its charter had expired or been revoked for cause, and in respect to its corporate business in the state, it is legally dissolved.⁷¹

§ 5989. Remedies of corporation wrongfully excluded. Whether a corporation has any remedy to compel a public officer to grant it a permit or certificate to do business in the state, on his refusal to issue the same, depends upon the terms of the statute and the duties thereby imposed upon the officer. If the statute gives him a discre-

rights which the statute did not take away or destroy, and among these was the right to sue upon any valid contract, and also the right to make defense in any action instituted against it. As these were never inhibited by the statute, they cannot be deemed to have been affected or taken away by the revocation of the privilege that had vested under the restrictive statute. Neither the statute nor the revocation of the privilege touched these rights or in any way circumscribed or limited the jurisdiction of the court. Therefore a jurisdiction which had vested was not destroyed by a revocation of the privilege. Any other conclusion would be so clearly unjust and unpolitic that the legislature cannot be deemed to have intended it, and if it did the statute might be to that extent unconstitutional. When the contract was made, the remedy for its enforcement was a part of it. Surely the legislature did not intend to destroy or impair the contract, and to deny all remedy for its enforcement in the courts of this state and compel the obligee to resort to the courts of another state would amount to a clear impairment of its obligations. Remedies may be altered or limited by the legislature, but not entirely denied."

⁷⁰ *American Ins. Co. v. Stoy*, 41 Mich. 385, 1 N. W. 877; *McCutcheon v. Rivers*, 68 Mo. 122.

⁷¹ *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 W. Va. 696, 26 L. R. A. (N. S.) 1101, 66 S. E. 1073. *Poffenbarger, J.*, said: "In respect to its corporate business and holdings in this state it is legally dissolved. Though it may still exist in another state as an entity, it ceases to be recognized as such here for the purpose of carrying on its business. Its corporate transactions as effectually cease here as if it were dissolved. Its property can no longer be handled for its general corporate purposes. We think, therefore, the legislature in subjecting it to the liabilities imposed upon domestic corporations intended to subject it, on the revocation of its privilege, to the general laws relating to the winding up of domestic corporations, in so far as they are applicable. By these laws a corporation, after dissolution, still remains a corporation in contemplation of law for the purposes of suits to collect debts due it, and the settlement and distribution of its assets. * * * When, for any reason, a corporation has no longer a right to exist, dissolution, payment of debts, and distribution of surplus in some form inevitably result."

tionary power in the matter, the courts cannot review the exercise of his discretion and compel him, by mandamus or otherwise, to issue a permit or certificate. His determination in the matter is final.⁷² Thus where the determination of the superintendent of insurance in granting, refusing, or revoking licenses authorizing insurance companies to transact business within the state involves the exercise of official judgment and discretion on his part, his action in respect to such licenses cannot be controlled or directed by mandamus,⁷³ when,

72 Connecticut. *American Casualty Insurance & Security Co. v. Fyler*, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494.

Kansas. *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265.

Massachusetts. *Provident Sav. Life Assur. Society v. Cutting*, 181 Mass. 261, 92 Am. St. Rep. 415, 63 N. E. 433.

New York. *People v. Fairman*, 12 Abb. N. Cas. 252; *In re Hartford Life & Annuity Ins. Co.*, 63 How. Pr. 54.

North Dakota. *State v. Carey*, 2 N. D. 36, 49 N. W. 164.

Ohio. *State v. Moore*, 42 Ohio St. 103.

Under the Texas statute providing for the issuance of permits to foreign corporations, the secretary of state is given the power to limit the business of a foreign corporation to one or more purposes, if it is chartered for several purposes. *San Antonio v. Salvation Army* (Tex. Civ. App.), 127 S. W. 860.

73 Dwelling-House Ins. Co. v. Wilder, 40 Kan. 561, 20 Pac. 265; *State v. Carey*, 2 N. D. 36, 49 N. W. 164.

In holding that the determination of the superintendent of insurance in granting, refusing or revoking licenses authorizing insurance companies to transact business within the state involved the exercise of official judgment and discretion on his part, which could not be controlled or directed by mandamus, after distinguishing *Phoenix Ins. Co. v. Welch*, 29 Kan. 672, in *Dwelling-House Ins. Co. v. Wilder*, 40

Kan. 561, 20 Pac. 265, Johnston, J., said: "It is true, as there stated, that the legislature has fixed the conditions upon which insurance companies may do business in the state, and that the superintendent is without authority to impose any other. It is true, also, that certain rules have been laid down to govern the superintendent in determining whether the conditions imposed have been complied with; but after he has applied these rules to the facts in the case, it still remains for him to officially judge or determine whether the conditions exist. The superintendent has no right to discriminate in favor of one company and against another of the same character and standing, nor to arbitrarily and capriciously exclude any company from the state. He is expected to honestly investigate and determine, under the rules furnished for his guidance, whether the conditions and requirements of the legislature have been complied with; but when he acts, and the determination is reached calling for the exercise of official judgment, the motives which actuated him are not open to inquiry in the action of mandamus. If the action of the superintendent of insurance was erroneous, unjust, or corrupt, the party aggrieved is not without a remedy. The legislature has provided one which is both ample and speedy, where it empowers the governor, whenever he shall become satisfied that the superintendent is inefficient, incompetent,

in so doing, he acts within the limits of a discretion expressly conferred upon him by statute.⁷⁴ Likewise, where the state auditor is clothed with authority to issue certificates to foreign insurance companies, to transact business in the state, and it is his duty to issue certificates to none but solvent companies which have complied with the statutes of the state in all respects, his duties are of such a nature that mandamus should not issue to control his action, unless it is clear that there is a wilful disregard of duty on his part.⁷⁵ And where, by statute, the insurance commissioner is vested with the power to revoke the license of any foreign insurance company for failure to comply with any provision of law enacted for the regulation of such companies, and as an incident to that power, he is authorized to revoke licenses for past violations, or withhold a license until the insurance company has fully complied with all legal requirements, mandamus will not lie to compel him to issue such license to a foreign accident insurance company which has failed to pay certain license fees, notwithstanding the right to recover such fees might be barred by the statute of limitations.⁷⁶ Under a statute authorizing the incorporation of mining corporations and providing that foreign corporations organized for the purposes contemplated by the statute upon filing a copy of their charter with the secretary of state and county clerk, may carry on business in the state and enjoy all the rights and privileges and be subject to all the restrictions and liabilities of corporations organized under such state, mandamus will not issue to compel the secretary of state to file the articles of association of a foreign mining corporation empowered to carry on business not authorized by the laws of the state to domestic corporations.⁷⁷ Under

tent, or neglectful of his duties or that he is corrupt or dishonest in the discharge of his duties, to remove him from office and fill the vacancy by the appointment of another."

See, however, *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, 23 Pac. 1061, where *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265, is distinguished and where under a later statute amending the statute involved in that case, it was held that the determination of the superintendent of insurance in granting, refusing or revoking authority to a mutual fire insurance company to do business, on account of insolvency or noncompli-

ance with the laws of the state, was not final, but his action in that regard was subject to inquiry and control by the court.

⁷⁴ *State v. Carey*, 2 N. D. 36, 49 N. W. 164.

⁷⁵ *State v. Benton*, 25 Neb. 834, 41 N. W. 793.

⁷⁶ *State v. Fricke*, 102 Wis. 107, 78 N. W. 455, 77 N. W. 732. See *Traveler's Ins. Co. of Hartford v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 78 N. W. 407, 74 N. W. 372.

⁷⁷ *Isle Royale Land Corporation v. Secretary of State*, 76 Mich. 162, 43 N. W. 14.

a statute providing that it shall be the duty of the superintendent of insurance, upon being satisfied that any foreign insurance company, or agent thereof has violated any of the provisions of the statute regulating its right to do business in the state, to revoke the license of the company or agent so offending, and that no license shall be granted to such company or agent, for one year after such revocation, it is held that it is within the discretion of the superintendent of insurance to refuse a license as agent of a foreign life insurance company to one who, in violation of the statute, has, without first obtaining such license, solicited applications for insurance in such company and, as a part of such solicitation, has offered a rebate of a portion of the regular premium.⁷⁸ Whether the unrestricted power and discretion to either grant or withhold a permit to do business within the state, and to revoke or not revoke a permit when granted, is or is not wisely vested in the officer vested with such power and discretion, are questions which address themselves to the legislature enacting the statutes conferring such power and discretion, and the courts cannot consider the expedience of any laws which the legislature has power to enact. To do so would result in the usurpation by the courts of the very power and discretion which the law confers upon others.⁷⁹

Where, however, the public officer empowered to issue the permit or certificate authorizing a foreign corporation to do business in the state, is not vested with a discretionary power, but is required by the statute regulating the doing of business in the state by the foreign corporation to issue the permit or certificate to the foreign corporation upon the performance or existence of certain conditions, in such a case, if he wrongfully refuses to issue a permit or certificate and the right thereto is clear,⁸⁰ the courts may compel him by mandamus at the suit of the corporation to issue the same.⁸¹ So where it is pro-

⁷⁸ *Vorys v. State*, 67 Ohio St. 15, 65 N. E. 150. Shauck, J., said: "By the explicit terms of this section, it would have been the duty of the superintendent to revoke the license, if one had been issued, and would at the time of the application have been without authority to grant another. His refusal, being in accordance with the manifest spirit of the statute, and in furtherance of its obvious purpose, was within his discretion, if not within his imperative duty."

⁷⁹ *State v. Carey*, 2 N. D. 36, 49 N. W. 164, citing *High*, Extr. Rem. §§ 44, 46.

⁸⁰ *State v. Benton*, 25 Neb. 834, 41 N. W. 793.

⁸¹ *Kansas*. *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731, 23 Pac. 1061, distinguishing *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561, 20 Pac. 265, on account of the difference in the statutes.

Michigan. *Isle Royale Land Corporation v. Secretary of State*, 76

vided by statute that the insurance commissioners shall issue a license to a foreign insurance company possessed of a specified paid-up capital, invested in certain securities, and of certain assets, upon filing with the secretary of state certain documents and a statement showing its financial condition, and its compliance with the titles relating to insurance, mandamus will lie to compel the insurance commissioners to issue such license to a foreign corporation, upon the filing by it of the proper documents required by statute.⁸² Under a statute providing that if a foreign insurance company has complied with certain prescribed regulations and the insurance commissioner is satisfied that the company has the requisite capital and assets, and that it is a safe, reliable company, entitled to confidence, he shall grant a license to it to do insurance business by authorized agents within the state, the insurance commissioner cannot refuse to issue a license to a foreign corporation which has complied with all the requirements of the statute, and satisfied him as to the requirements of the statute, because the company is carrying on in combination the business of a surety company and that of a burglary insurance company, and he believes that an insurance company carrying on two or more distinct classes of insurance business is theoretically unsafe and unreliable.⁸³ Of course, the officers will not be required to issue a certificate until the corporation has complied with all the requirements of the statute.⁸⁴ Thus where a statute provides that a permit to do business in the state shall not be issued to a foreign corporation unless it is shown that fifty per cent of its authorized capital stock has been subscribed, mandamus will not lie to compel the secretary of state to issue such permit to a foreign corporation, which fails to show compliance by it with the conditions imposed by law to entitle it to demand such certificate.⁸⁵ And where it is provided by statute

Mich. 162, 43 N. W. 14.

Montana. State v. Rotwitt, 18 Mont. 92, 44 Pac. 407.

Nebraska. State v. Benton, 25 Neb. 834, 41 N. W. 793.

New Hampshire. United States Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956.

Texas. Metropolitan Life Ins. Co. v. Love, 101 Tex. 444, 108 S. W. 821, 1157.

Vermont. Bankers' Life Ins. Co. v. Howland, 73 Vt. 1, 57 L. R. A. 374, 48 Atl. 435.

Wisconsin. State v. Root, 83 Wis.

667, 19 L. R. A. 271, 54 N. W. 33.

⁸² Bankers' Life Ins. Co. v. Howland, 73 Vt. 1, 57 L. R. A. 374, 48 Atl. 435.

⁸³ United States Fidelity & Guaranty Co. v. Linehan, 73 N. H. 41, 58 Atl. 956.

⁸⁴ English & Scottish - American Mortg. & Inv. Co. v. Hardy, 93 Tex. 289, 55 S. W. 169; State v. Fricke, 102 Wis. 107, 78 N. W. 455, 77 N. W. 732. See also State v. Benton, 25 Neb. 834, 41 N. W. 793.

⁸⁵ English & Scottish American

that every foreign corporation shall on or before the first day of July of each year pay a certain annual license and such year is held to begin on the first day of July and not to be a calendar year, mandamus will not lie to compel the issuance of a license for a calendar year.⁸⁶

Under some circumstances, the state official charged with the statutory duty and with the power to issue and revoke licenses or permits authorizing foreign corporations to do business in the state may be restrained by injunction from revoking the license issued to a foreign corporation to do business in the state.⁸⁷ Thus injunction, and not mandamus, is the proper remedy to test the question of the amount of taxes to be paid to the superintendent of insurance under a statute making it his duty to charge and collect from insurance companies certain taxes provided for by such statute, and to prevent him from revoking the license, already granted, of an insurance company to do business in the state.⁸⁸ And a suit for injunction may be maintained

Mortg. & Inv. Co. v. Hardy, 93 Tex. 289, 55 S. W. 169.

⁸⁶ *State v. Jenkins*, 22 Wash. 494, 61 Pac. 141.

⁸⁷ *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, aff'g *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Western U. Tel. Co. v. Julian*, 169 Fed. 166; *State v. Hahn*, 50 Ohio St. 714, 35 N. E. 1052, overruling *State v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30; *Equitable Life Assur. Society v. Host*, 124 Wis. 657, 4 Ann. Cas. 413, 102 N. W. 579.

See as to application for prohibition to prevent revocation of license, *State v. Johnston*, 234 Mo. 338, 137 S. W. 595.

Such a suit will not be defeated by the fact that the state official, after the institution of the suit and the acquisition by the court of jurisdiction over the subject-matter, but before the preliminary restraining order became effective or was served upon him, actually revoked the license of the complainant to do business in the state, for the court having acquired jurisdiction over the subject-matter of

the suit before he acted, he could not therefore prejudice or defeat the rights of the complainant. In such a case a court of equity has ample power to compel by mandatory injunction the restoration of the former order of things, and prevent the gaining of advantage by reason of the wrongful act. *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480, citing *Re Lennon*, 166 U. S. 548, 41 L. Ed. 1110.

⁸⁸ *State v. Hahn*, 50 Ohio St. 714, 35 N. E. 1052. The court said: "The real object is to prevent a revocation of its permit to do business in this state, and for such object the proper remedy is injunction. Should the license be revoked, and the relator comply in all respects with the laws of this state, and the superintendent of insurance refuse to issue a new license, he could be compelled to do so by mandamus. But this is not such case. Here the object is to enjoin the superintendent from revoking the license. True, the case of *State v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30, was a case like the one here under consideration, and the remedy was by mandamus; but the question as to

by a foreign corporation doing business in a state to prevent a state officer from cancelling its license to do business therein, because of its violation of an unconstitutional statute.⁸⁹ Such a suit is not one against the state.⁹⁰

Where the supreme court of a state has original jurisdiction in mandamus, but has no original jurisdiction in matters of injunction, it has no jurisdiction of a suit for an injunction in the form of a proceeding in mandamus, as it is the substance, and not the form, which gives the real character to the proceeding. Hence a proceeding by mandamus to prevent a public officer from revoking an existing license of a foreign corporation to do business in the state should be dismissed.⁹¹

Where the court, in an action by a foreign insurance company to restrain the commissioner of insurance from revoking the license issued to it to do business in the state, found that the issue by it of deferred dividend policies by which the distribution of dividends was deferred beyond the period of five years to citizens of the state was contrary to a state statute and unlawful and the commissioner of insurance might and should revoke the company's license to do business in the state, and judgment was rendered accordingly, it was held that the judgment was erroneous and should be reversed, inasmuch as it adjudged that numerous policies issued by the company to citizens of the state, aggregating a large amount, were unlawful, without any of the holders of such policies having been made parties, or given a hearing, or having appeared in the action.⁹²

XVII. ACTIONS BY FOREIGN CORPORATIONS

§ 5990. Right to maintain actions. In discussing, in a preceding section, the doctrine of comity as applied to actions by foreign corporations, it has been seen that the rule is well settled that a foreign

remedy was not there raised, and it seems not to have been thought of by anyone connected with the case. It is therefore not an authority in favor of mandamus in such cases."

⁸⁹ *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, aff'g *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Western U. Tel. Co. v. Julian*, 169 Fed. 166.

⁹⁰ *Harrison v. St. Louis & S. F. R.*

Co., 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915 F 1187, aff'g *St. Louis & S. F. R. Co. v. Cross*, 171 Fed. 480; *Western U. Tel. Co. v. Julian*, 169 Fed. 166.

⁹¹ *State v. Hahn*, 50 Ohio St. 714, 35 N. E. 1052, overruling *State v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30.

⁹² *Equitable Life Assur. Society v. Host*, 124 Wis. 657, 4 Ann. Cas. 413, 102 N. W. 579.

corporation has the power to sue at law or in equity in the courts of another state or country, and the same right to do so under the rule of comity, as a domestic corporation or as a nonresident natural person, unless it is prevented from doing so by some express statutory provision, or unless it seeks to assert and enforce a claim which is contrary to the established policy of the state.⁹³ Subject to the same qualifications, a foreign corporation may sue to foreclose a mortgage

⁹³ See § 5748, *supra*. See also:

United States. Robinson v. American Linseed Co., 147 Fed. 885; New York Dry Dock v. Hicks, 5 McLean 111, Fed. Cas. No. 10,204.

Alabama. Ashurst v. Arnold Henegar-Doyle Co., 78 So. 386; Ginn v. New England Mortgage Security Co., 92 Ala. 135, 8 So. 388.

Arkansas. Jones v. Southern Coöperation Co., 94 Ark. 621, 127 S. W. 704.

Colorado. Kindel v. Beek & Pauli Lithographing Co., 19 Colo. 310, 24 L. R. A. 311, 35 Pac. 538.

Indiana. See Singer Mfg. Co. v. Effinger, 79 Ind. 264.

Kansas. Colonial & United States Mortg. Co. v. Catlin, 8 Kan. App. 860, 57 Pac. 140. See Hamilton v. Reeves & Co., 69 Kan. 844, 76 Pac. 418.

Louisiana. Buck v. Massie, 109 La. 776, 33 So. 767.

Massachusetts. See National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510, 82 N. E. 671.

Michigan. Louis J. Selznick Enterprises, Inc. v. Harry J. Garson Productions Co., 202 Mich. 106, 167 N. W. 1010.

Missouri. Missouri Coal & Mining Co. v. Ladd, 160 Mo. 435, 61 S. W. 191; Rialto Co. v. Miner, 183 Mo. App. 119, 166 S. W. 629.

Nebraska. Holt v. Rust-Owen Lumber Co., 2 Neb. (Unoff.) 170, 96 N. W. 613.

New Hampshire. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 66 L. R. A. 574, 56 Atl. 465.

New Jersey. Slaytor-Jennings Co. v. Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247; MacMillan Co. v. Stewart, 69 N. J. L. 212, 54 Atl. 240.

New York. Onderdonk v. Peale, Peacock & Kerr, 104 App. Div. 195, 93 N. Y. Supp. 505; Western Nat. Bank of Louisville v. Kelly, 48 Misc. 366, 95 N. Y. Supp. 574; Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836; Fisher v. World Mut. Life Ins. Co., 47 How. Pr. 451; New York Floating Derriek Co. v. New Jersey Oil Co., 10 N. Y. Super. Ct. 648.

Ohio. Lewis v. Bank of Kentucky, 12 Ohio 132, 40 Am. Dec. 469; Mohr & Mohr Distilling Co. v. Lamar Ins. Co., 7 Wkly. L. Bul. 341.

See also §§ 5731, 5749, 5783, 5913, 5936, *supra*.

“The general expression that foreign corporations may not sue until they have put themselves in a position to be sued in domestic courts, contained in George M. Muller Mfg. Co. v. First National Bank of Dothan, 176 Ala. 229, 231, 57 South. 762, and in Ala. West. R. R. Co. v. Talley-Bates Const. Co., 162 Ala. 396, 403, 50 South. 341, is contrary to, and must be now modified to conform with, that line of authority from Lucas v. Bank, 2 Stew. 147, to Worth v. Knickerbocker Trust Co., 171 Ala. 621, 55 South. 144. Examination of both cases, however, will show that no conflict was intended.” Ashurst v. Arnold-Henegar-Doyle Co., — Ala. —, 78 So. 386.

in the state.⁹⁴ A foreign corporation may maintain an action to recover damages for torts committed against it, as for libel, for example, or for conversion, trespass, nuisance and other torts committed with respect to property which it owns within the state.⁹⁵

§ 5991. Right to benefit of statutory remedies. A foreign corporation is not only entitled to sue at common law and in equity, but it is also entitled to the benefit of statutory remedies, unless there is something in the statute to exclude it from such benefit.⁹⁶

A foreign corporation doing business in the state will be held subject, of course, to the same limitation in taking advantage of a statutory remedy as is imposed upon a resident of the state.⁹⁷

§ 5992. Denial to foreign corporation of right to sue. The power of a state to deny to a foreign corporation the right to maintain

94 United States. *Caesar v. Capell*, 83 Fed. 403; *Hards v. Connecticut Mut. Life Ins. Co.*, 8 Biss. 234, Fed. Cas. No. 6,055; *Farmers' Loan & Trust Co. v. McKinney*, 6 McLean 1, Fed. Cas. No. 4,667; *New York Dry Dock v. Hicks*, 5 McLean 111, Fed. Cas. No. 10,204.

Alabama. *American Building, Loan & Tontine Sav. Ass'n v. Haley*, 132 Ala. 135; *Christian v. American Freehold Land & Mortgage Co.*, 89 Ala. 198, 7 So. 427.

Illinois. *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46, rev'g 6 Ill. App. 551; *Stevens v. Pratt*, 101 Ill. 206.

Indiana. *Elston v. Piggott*, 94 Ind. 14.

Kentucky. *Lathrop v. Commercial Bank*, 8 Dana 114, 33 Am. Dec. 481; *Herndon v. Bascom*, 8 Dana 113.

Louisiana. *Frazier v. Willecox*, 4 Rob. 517.

Massachusetts. *American Mut. Life Ins. Co. v. Owen*, 15 Gray 491.

Minnesota. *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

Mississippi. *Williams v. Creswell*, 51 Miss. 817.

Missouri. *Ferguson v. Soden*, 111

Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727; *Long v. Long*, 79 Mo. 644; *Connecticut Mut. Life Ins. Co. v. Albert*, 39 Mo. 181.

New Hampshire. *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381.

New Jersey. *National Trust Co. v. Murphy*, 30 N. J. Eq. 408.

New York. *Bard v. Poole*, 12 N. Y. 495.

Wisconsin. *Chickering-Chase Bros. Co. v. White*, 127 Wis. 83, 106 N. W. 797; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, 97 N. W. 940. See §§ 5863, 5864, *supra*.

⁹⁵ See §§ 5748, 5890, 5891, *supra*.

⁹⁶ **Illinois.** *Givens v. Merchants' Nat. Bank of St. Louis*, 85 Ill. 442.

New York. *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. 1.

South Dakota. *Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109.

Tennessee. *Union Bank v. United States Bank*, 4 Humph. 369.

Texas. *Ross v. Kansas City Southern R. Co.*, 34 Tex. Civ. App. 586, 79 S. W. 626.

See §§ 2938, 5749, *supra*.

⁹⁷ *Ross v. Kansas City Southern R. Co.*, 34 Tex. Civ. App. 586, 79 S. W. 626.

actions in its courts has not been settled by any decision. No state has absolutely and unrestrictedly prohibited foreign corporations from maintaining actions in its tribunals.⁹⁸ The general power of a state to restrict the right of a foreign corporation to sue in its courts has been recognized by the Supreme Court of the United States.⁹⁹

As has been seen elsewhere, statutes exist in many states prohibiting the bringing or maintenance by a foreign corporation of actions in the courts of the state, unless they have complied with statutory conditions upon their right to do business in the state where such statute obtains.¹ Statutes forbidding the right to institute and maintain actions, except as a means of enforcing compliance by foreign corporations with statutory conditions precedent to the right to do business in the state, are seldom, if ever, found in any state, and when used for this purpose they do not withhold from a corporation, which has failed to comply with such conditions, the right to sue for the enforcement of contracts made before the statute was

⁹⁸ In *National Tel. Co. v. DuBois*, 165 Mass. 117, 30 L. R. A. 628, 52 Am. St. Rep. 503, 42 N. E. 510, where it was held that the courts of equity in Massachusetts are not open to a foreign corporation as a matter of strict right, but as a matter of comity, in a suit by it against a citizen of another state, Morton, J., said: "And if it appears that complete justice cannot be done here, or that the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which all will be avoided, without especial hardships to the plaintiff, if suit is brought against the defendant in the state where he lives, and where the alleged debt was contracted, and where personal service can be made on him, we think that our courts should decline to take jurisdiction."

⁹⁹ *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373,

48 L. Ed. 225, aff'g 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 589-591, 10 L. Ed. 274. See, generally, §§ 5731, 5748, 5749, 5913, 5936, *supra*.

As to restrictions upon suits by one foreign corporation against another, see the next section, *supra*.

¹ See §§ 5782, 5913, *supra*; §§ 5995, 5996, *infra*.

For the unconstitutionality of statutes restricting the right to enforce payment for goods sold in interstate commerce, see § 5782, *supra*.

A foreign corporation does not forfeit its right to maintain an action upon its interstate contract by engaging in intrastate commerce business subsequent to the making of such interstate contract and failing to comply with Gen. Stat. Minn. 1913, §§ 6206-6208, imposing certain conditions upon the transaction of business in the state by foreign corporations. *Victor Talking Mach. Co. v. Lueker*, 128 Minn. 171, 150 N. W. 790.

passed, or contracts made between other parties and assigned to them, or contracts made by them out of the state.²

§ 5993. Suit by one foreign corporation against another. One foreign corporation may maintain an action against another foreign corporation, if the action could be maintained by an individual or by a domestic corporation, unless there is some statute which denies to a foreign corporation the right to maintain such an action.³ A foreign corporation may maintain a suit to enjoin proceedings under an arbitration agreement with another foreign corporation, the arbitrators, who are also made parties defendant, being residents of the state. A foreign corporation which has not transacted business in the state may sue another foreign corporation upon a cause of action arising in another state, though the plaintiff corporation has not complied with such statute.⁴

² Underwood Typewriter Co. v. Piggett, 60 W. Va. 532, 55 S. E. 664. See, §§ 5960, 5961, *supra*.

³ Emerson, etc., v. McCormick Harvester Co., 51 Mich. 5, 16 N. W. 182; Kline Bros. & Co. v. North Coast Fire Ins. Co., 80 Wash. 609, 142 Pac. 7. See § 5960, *supra*.

Under section 1780 of the New York Code of Civil Procedure expressly permitting a foreign corporation to bring an action against another foreign corporation, "1. Where the action is brought to recover damages for the breach of a contract made within the state," or "4. Where a foreign corporation is doing business within this state," it is held that where the contract was made within the state, and the defendant was, and had been for many years, doing business within the state, and had been licensed so to do, the courts of the state had jurisdiction of the action on the contract, and there is no state policy that such jurisdiction should not be exercised, even though the plaintiff corporation had not complied with the requirements of the statute and procured authority to do business in the state. *Barney & Smith Car Co. v. E. W. Bliss*

Co., 100 N. Y. Misc. 21, 164 N. Y. Supp. 800.

⁴ *Simpson Fruit Co. v. Atehison, T. & S. F. R. Co.*, 245 Ill. 596, 92 N. E. 524, *rev'g* 152 Ill. App. 235, and saying: "The Appellate Court in its opinion held that the appellant being a nonresident corporation and having failed to comply with the provisions of 'An act to regulate the admission of foreign corporations for profit to do business in the state of Illinois,' it could not maintain a suit in the courts of this state. The case of *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354, having been decided by this court since this case was determined in the Appellate Court, that question has not been discussed in the briefs filed in this court, but the position has been taken in this court that the parties to the litigation, both the plaintiff and defendant, being nonresident corporations and the cause of action having arisen outside the limits of this state, the municipal court erred in taking jurisdiction of the case. In the *Alpena Portland Cement Co.* case it was held that a foreign corporation has the right to bring a suit in this state in

The denial by a state of jurisdiction to its courts over suits by one foreign corporation against another foreign corporation on a foreign judgment does not violate sec. 1 of Article 4 of the Federal Constitution providing that full faith and credit shall be given in each state to the acts, judicial proceedings and records of every other state. Thus where it was provided by a state statute that an action might be maintained against a foreign corporation by another foreign corporation only where the cause of action arose within the state, it was contended that under such provision of the Federal Constitution, the state could not preclude foreign corporations from suing upon judgments obtained in another state, because to do so was to deny full faith and credit to those judgments. The Court of Appeals of New York held to the contrary, and its decision was upheld by the Supreme Court of the United States, which held that such statutory provision was not unconstitutional.⁵

all transitory actions where permission to do so has not been withdrawn by statute. This action was transitory and the appellee was served with process in the city of Chicago, and there is no statute in force in this state withdrawing permission from foreign corporations to bring suits in this class of actions in this state against foreign corporations where the cause of action arises outside of this state. The municipal court, therefore, under the doctrine announced in that case, had jurisdiction of the parties and the subject-matter of the suit and might lawfully proceed to judgment." See also *Direct United States Cable Co. v. Dominion Cable Co.*, 84 N. Y. 153, rev'g 22 Hun 568; *King v. Monitor Drill Co.*, 42 Tex. Civ. App. 288, 92 S. W. 1046.

⁵ *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225, aff'g 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587. Holmes, J., said: "The state court decides that the cause of action did not arise within the state in the sense of the words of the Code, and, of course, we follow its construction, subject to the inquiry whether the statute as con-

strued is consistent with the Constitution of the United States. We are of the opinion that the section of the Code as construed is not unconstitutional. The precise point has not been decided by this court, but it has been laid down in cases which raise greater difficulties than the present that this provision of the Constitution establishes a rule of evidence rather than of jurisdiction. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. Ed. 239; *Andrews v. Andrews*, 188 U. S. 14, 47 L. Ed. 366. The Constitution does not require the state of New York to give jurisdiction to the Supreme Court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. U. S. Rev. St. § 905. But the Constitution does not require the state to provide such a court. * * * If the state does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class. * * * But that right,

§ 5994. Effect of dissolution upon suits by foreign corporation.

The right of a foreign corporation to maintain a suit after its dissolution, the effect upon such dissolution on pending suits, and the mode of presenting the question of the dissolution of the plaintiff have been considered heretofore.⁶

§ 5995. Noncompliance with statutes as affecting right to sue. As has been seen elsewhere, the right of a corporation to do business, acquire and hold property and make contracts in another state or country than that by which it was created is a matter of comity, and may be denied by the other state or country so long as the denial does not overstep constitutional limitations. And a state may restrict the right of a foreign corporation to sue in its courts, if the restriction is within the limitations which the Federal Constitution places upon state action.⁷

Sometimes a statute requiring a foreign corporation to comply with certain conditions precedent to the right to do business in the state provides that a foreign corporation which shall fail to comply with the statutory requirements shall not maintain any suit in any court in the state. The effect of such legislation has given rise to much judicial controversy.

It is held that under a statute prohibiting foreign corporations doing business in the state and amenable to its provisions from doing business in the state until they shall comply with certain statutory requirements, and providing that foreign corporations which shall fail or neglect to comply with such requirements shall be subject to a monetary penalty and that no suit may be maintained by such

even when the suit was upon a judgment of another state would not rest on the 1st section of Article IV, on which the plaintiff relies or can rely, but would depend on the 2d section, entitling the citizens of each state to all the privileges and immunities of citizens in the several states. The plaintiff is not a citizen within this section * * * and did not set it up. The general power of a state to restrict the right of a foreign corporation to sue in its courts is assumed in *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 589-591, 10 L. Ed. 274. * * * What, if any, limits there may be to state restrictions of

state courts, when such restrictions do not encounter Article IV, § 2, of the Constitution, it is unnecessary to discuss. But we think it too plain for further argument that the New York restriction upon suits by foreign corporations against foreign corporations is not affected by either § 1 or § 2 of Article IV."

⁶ See §§ 5810-5819, *supra*. See also Chap. 64, *supra*, as to the dissolution of corporations.

For effect of revocation of permit to do business in the state upon suits by foreign corporation, see § 5988, *supra*.

⁷ See §§ 5734-5751, *supra*.

corporation, either at law or equity, upon any claim, legal or equitable, whether arising out of contract or tort, in any court in the state, a noncomplying foreign corporation doing business in the state which does not constitute interstate commerce cannot maintain a suit in the courts of that state.⁸ And if the suit is upon a contract it is immaterial that the contract was made in another state. The prohibition is directed against the maintaining of a suit by a foreign corporation doing business in the state without compliance with the

⁸ *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567, aff'g 124 Ill. App. 174; *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106, aff'g 86 Ill. App. 76; *Tennessee Packing & Provision Co. v. Fitzgerald*, 140 Ill. App. 430; *Central Mfg. Co. v. Briggs*, 106 Ill. App. 517; *Union Cloak & Suit Co. v. Carpenter*, 102 Ill. App. 339; *Richardson v. United States Mortgage & Trust Co.*, 89 Ill. App. 670, aff'd 194 Ill. 259, 62 N. E. 606; *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, 100 N. W. 1101; *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441; *Chicago Mill & Lumber Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; *Dunaway v. Day*, 163 Mo. 415, 63 S. W. 731; *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636; *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664. See also *Trower Bros. v. Hamilton*, 179 Mo. 205, 77 S. W. 1081.

Under a constitutional provision that no foreign corporation shall do any business in the state without having one or more known places of business in the state and an agent or agents therein upon whom process may be served, and a statute, passed in aid thereof, requiring every foreign corporation before doing business in

the state to file certain instruments, pay certain fees and designate an agent for the service of process, and providing that no contract or agreement made in the name of or for the use and benefit of such corporation prior to the making of such filings can be sued upon or enforced in any court of the state by such corporation, that any conveyance of real estate to such foreign corporation prior to such filings "shall be absolutely null and void," and that all officers, agents and representatives of noncomplying corporations shall be, jointly and severally, personally liable upon all contracts and agreements made in violation of the statute, and that any foreign corporation failing to comply with the statute shall not be entitled to the benefit of the statute of limitations, it is held that a foreign corporation failing to comply with the requirements of the Constitution and statute cannot maintain a suit or action in any of the courts of the state for breach or violation of any contract entered into during the time the corporation had so failed and neglected to comply, as contracts entered into by it during such period were void. The court said: "The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful. It would hardly be consonant with the duties of the courts and the office of the judicial department of the state to uphold and enforce contracts at the instance and

requirements of the statute.⁹ Under such a statute, a contract made by a foreign corporation which has not complied with the requirements of the state so as to authorize it to do business in the state is void and no action can be maintained thereon at any time, even if the corporation should at some time after the making of the contract qualify itself to do business in the state by a compliance with the statute.¹⁰ It is held that the prohibition in the statute against main-

on the application of corporations or individuals that have transacted business in the manner and under conditions which both the framers of the Constitution and the legislative department of the state have said shall be unlawful. The courts are established for the purpose of upholding and enforcing the Constitution and laws of the state, and, when once they have arrived at the purpose and intent of the lawmaking department, it is their duty to enter such judgments and decrees as will render effective that intent. The corporations that have transacted business without observing the legal requirements, and also their assignees with notice, are therefore left without a remedy for the enforcement of such contracts.” *Katz v. Herrick*, 12 Idaho 1, 86 Pac. 873, 875, quoting with approval, *Clark & M., Priv. Corp.* (1st Ed.) § 847b.

⁹ *Tennessee Packing & Provision Co. v. Fitzgerald*, 140 Ill. App. 430, citing *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106; *Oil, Paint & Drug Pub. Co. v. Stroud*, 156 Ill. App. 312.

In *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020, Marshall, J., said: “Contracts entered into by foreign corporations in the states of their domicile with citizens of this state, where valid according to the law of the state of their domicile, and not prohibited by the laws of this state,

are valid contracts and will be enforced in this state as a matter of comity, and such corporations are not required to comply with the statutes cited in order to maintain such actions. In other words, the statute was not intended to affect such cases, nor to change the rules of comity that have always been observed by the courts of the several states. The statute is leveled at and confined to foreign corporations that transact business in this state, and the asking the aid of the courts to enforce contracts that relate to legitimate business done in other states, and that is not prohibited by the laws of this state, does not constitute doing or transacting business in this state within the meaning of the statute.”

¹⁰ *Dixie Cotton Felt Mattress Co. v. Stearns & Foster Co.*, 185 Fed. 431; *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521, aff’g 146 Ill. App. 257; *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248; *United Lead Co. v. J. W. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 6 Ann. Cas. 637, 78 N. E. 567, aff’g 124 Ill. App. 174; *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 76 Am. St. Rep. 51, 56 N. E. 1106; *Erie & M. Ry. & Nav. Co. v. Central Railway Engineering Equipment Co.*, 152 Ill. App. 278; *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441, disapproving *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772; *Chicago Mill & Lumber Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Tri-State Amuse-*

taining an action implies a prohibition against beginning it, for the beginning of the action is one of the necessary steps in maintaining it,¹¹ and the word "maintain" as used in the statute is construed

ment Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020, distinguishing Carson-Rand Co. v. Stern, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772, and approving Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Woolen Mills v. Edwards, 84 Mo. App. 448; Ehrhardt v. Robertson, 78 Mo. App. 404; Blevins v. Fairley, 71 Mo. App. 259; Pierce Steam Heating Co. v. A. Seigel Gas Fixture Co., 60 Mo. App. 148; Williams v. Scullin, 59 Mo. App. 30. And see § 5972, supra.

Under a statute requiring foreign corporations, before they shall be authorized or permitted to do business in the state, to perform certain acts, and providing that every corporation doing business in the state, which shall neglect or fail to comply with such statutory requirements, shall be subject to a fine and that, in addition to such penalty, no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of the state, upon any demand, whether arising out of contract or tort, it is held in Missouri that a contract entered into in that state by a foreign corporation, which has not complied with the statute, by which it agreed to give theatrical performances in a theater in the state, is void, and that no action can be maintained by the foreign corporation for a violation of such contract, even though subsequent to the making thereof and prior to the institution of the suit, it complied with the provisions of the statute, and was duly authorized by the laws of the state to do business therein. *Tri-State Amuse-*

ment Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636.

11 *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441, disapproving *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772. The court said: "Counsel for the plaintiff practically concedes that by virtue of this provision it could not maintain any action in our courts upon such a demand until it complied with the statute, but claims that the statute does not prohibit the commencement of the action, and that the plaintiff may, after its noncompliance has been pleaded as a defense, comply with the statute and maintain the action. The case of *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, is cited in support of this contention. The case is in point, for the statute there under consideration was similar to our own. But we cannot accept this construction of the statute, for a prohibition against maintaining an action implies a prohibition against beginning it, for the beginning of the action is one of the necessary steps in maintaining it. More than that, the construction of the statute urged on behalf of the plaintiff would invite and foster the very evil it was intended to prevent. It would enable foreign corporations to do business in this state in defiance of our laws until some party, perchance, pleaded its noncompliance in an action brought by it to enforce a demand against him. Then it would comply, and the action would proceed. Such a construction is contrary to the letter and spirit of the statute, and,

to be practically synonymous with "bring" or "begin."¹² But it is

if adopted by the court, would directly tend to defeat the public policy sought to be enforced by its enactment. The most efficient way to compel obedience to this statute is to enforce it as it reads, and not to amend it by judicial construction so as to enable foreign corporations to avoid the consequences of a noncompliance with its terms by complying after the penalties have been incurred. We therefore hold that a foreign corporation doing business in this state without first complying with the statute cannot maintain an action in the courts of this state upon any contract or demand growing out of such unlawful business. Nor will compliance by it with the statute after making such a contract, or after the commencement of an action thereon, remove the bar of the statute. This conclusion is supported by the decisions of the courts of other states having a similar statute. *J. Walter Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106; *Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Eberhardt v. Robertson*, 78 Mo. App. 404."

In *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808, 90 S. W. 1020, the court overruled *Carson-Rand Co. v. Stern*, 129 Mo. 381, 32 L. R. A. 420, 31 S. W. 772, where it had been held that the word "maintain" meant literally "to hold by the hand," and in ordinary use "to uphold; to sustain; to keep up," while in pleading the law dictionaries define it to mean "to support what has already been brought into existence"; and that the word "maintain," as used in the statute, was broad enough to authorize a compliance with the statute after suit had been instituted. This decision in *Carson-Rand Co. v.*

Stern, supra, led to a diversity of ruling between the Kansas City and St. Louis Courts of Appeals. See *Ehrhardt v. Robertson*, 78 Mo. App. 404, where the Kansas City Court of Appeals cited the prior adjudications, which held that a contract entered into by a foreign corporation that had not complied with the statutes was void, and cited cases from Pennsylvania, Alabama, Oregon, Tennessee, Illinois, and Wisconsin which so construed similar statutes of those states, and called attention to the fact that the courts of Massachusetts ruled to the contrary, because the statutes of that state provided expressly that such contracts should be valid and affected only the remedy, and held that the *Carson-Rand Case* only decided that an after-compliance with the statute would authorize the foreign company to maintain a suit, but that it did not decide that an after-compliance with the statute would relate back and make valid a contract which was prohibited by the statute. On the other hand, the St. Louis Court of Appeals, in the case of *Chicago Mill & Lumber Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 128, construed the *Carson-Rand Case* as overruling the prior decisions of the two Courts of Appeals; and, upon the faith of that construction, and of cases decided in other jurisdictions, notably Washington, West Virginia, Indiana, Massachusetts, Colorado, South Dakota and by the federal courts, and from a consideration of the purposes and spirit of the statute itself, held that an after-compliance with the statute rendered the contract valid, as well as authorized the foreign corporation to maintain an action for the enforcement thereof.

See further § 5972, supra.

¹² *Delta Bag Co. v. Kearns*, 160 Ill. App. 93. See also *Oil, Paint & Drug*

held in a well considered Massachusetts case under a statute providing that no action shall be maintained or recovery had in any of the courts of the state by any foreign corporation so long as it fails to comply with the statutory conditions precedent to its right to do business in the state, and also providing that failure of foreign corporations to comply with such conditions shall not affect the validity of contracts made by or with such corporation, the word "maintain" carries a different meaning from "institute" or "begin," and implies that an action must be begun before it can be maintained; and that the effect of the statute is, therefore, when noncompliance with its terms is seasonably and properly pleaded, to stay proceedings until the temporary disability is removed, which can be done at any time after as well as before, resort to the courts.¹³

If a state, by statute, prohibits a foreign corporation from doing business and making contracts within its limits or prescribes conditions precedent to the right to do so, and the effect of the statute is such as to render illegal and void a contract made by a foreign corporation in violation of the prohibition, or without having complied with the conditions, it cannot maintain an action on the contract.¹⁴

As has been seen, some of the statutes imposing conditions precedent do not affect the validity of contracts made by a foreign corporation before compliance with their terms, but merely suspend the remedy,¹⁵ and some do not even suspend the remedy.¹⁶

It has been held in some of the state courts that a foreign corporation may be barred from maintaining an action in the courts of the state until it has filed a copy of its articles of incorporation with a duly designated official therein or performed other conditions precedent, whether such corporation be engaged in business in the state or merely engaged in interstate commerce, as a restriction of this character has reference not to the transaction of business but to the use of the powers of the local courts.¹⁷ But while it would seem that a state may deny to a foreign corporation not engaged in interstate commerce or in the employ of the federal government the right to maintain suits in the courts of the state until it has performed

Pub. Co. v. Stroud, 156 Ill. App. 312.

¹³ National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510, 82 N. E. 671, where the court considered the different rulings of the various states and distinguished many cases.

¹⁴ See §§ 5942-5948, *supra*.

¹⁵ See §§ 5944, 5972, *supra*.

¹⁶ See §§ 5942, 5948, 5972, *supra*.

¹⁷ John Deere Plow Co. v. Wyland, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863; Sioux Remedy Co. v. Cope, 28 S. D. 397, 133 N. W. 683, rev'g 235 U. S. 197, 59 L. Ed. 193; Iowa Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449.

certain conditions precedent, or may even deny this right absolutely, though such question is not definitely settled by the Supreme Court of the United States,¹⁸ yet a statute denying the right to a foreign corporation engaged merely in interstate commerce to sue in the courts of the state on a transaction arising out of interstate commerce or imposing unreasonable restrictions on its right to sue under such circumstances is unconstitutional.¹⁹ A statute providing that no foreign corporation shall sue or maintain an action in any of the courts of the state until it shall have appointed a resident agent in the state upon whom process against the corporation may be served and shall have filed such appointment and a copy of its charter in designated offices in the state and paid the incidental filing and recording fees, is unconstitutional as imposing an unreasonable burden upon interstate commerce, if it is construed as requiring a foreign corporation to subject itself to the jurisdiction of all the courts of the state as a condition of invoking the aid of any one of them, and as embracing actions to enforce contracts directly arising out of and connected with interstate commerce equally with actions having no relation to such commerce. The Supreme Court of the United States held such a statute to be an unreasonable exercise of the police power of the state and repugnant to the commerce clause of the Constitution.²⁰ Nor can a state prohibit a corporation created by an act of Congress from maintaining suits in the courts of the state either absolutely or until it has filed a copy of its charter or performed other conditions precedent.²¹

Statutes prohibiting a foreign corporation from maintaining suits in the courts of the state until it has filed a copy of its charter or performed other conditions precedent are rare, however. Generally, the statutes are directed against "doing business," or "doing any

¹⁸ See § 5992, *supra*. See also *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. Ed. 193, rev'g 28 S. D. 397, 133 N. W. 683; *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225, aff'g 169 N. Y. 506, 88 Am. St. Rep. 608, 62 N. E. 587; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 589-591, 10 L. Ed. 274.

¹⁹ See §§ 5762, 5763, 5992, *supra*. See also *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. Ed. 193; *Buck Stove & Range Co. v. Vickers*, 226 U. S.

205, 57 L. Ed. 189; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

²⁰ *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. Ed. 193, rev'g 28 S. D. 397, 133 N. W. 683.

See §§ 5762-5782, *supra*.

²¹ See *Texas & P. Ry. Co. v. Eastin*, 214 U. S. 153, 53 L. Ed. 946; *Re Dunn*, 212 U. S. 374, 53 L. Ed. 558; *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. Ed. 319.

See also § 5753, *supra*.

business" in the state, and they apply only where a foreign corporation does some part of its ordinary business in the state.²² As has been seen heretofore, the mere prosecution of a suit by a foreign corporation in a court of a state does not constitute doing business in such state within the meaning of such a statute, and a foreign corporation may, therefore, sue in the state court without having complied with the conditions, so long as the cause of action does not arise out of any violation of the statute, as has been elsewhere explained.²³ If it does not appear that a corporation plaintiff did business illegally in the state prior to its bringing suit, the fact of its doing business therein illegally after its institution of such suit does not constitute a defense.²⁴ If a foreign corporation has complied with the requirements of such statute at the time of bringing suit on a demand or tort, its status is established and it is entitled to maintain the same.²⁵

²² See §§ 5916, 5940, 5992, supra.

It is held in California that a general provision in the Code, that no corporation now in existence or hereafter formed shall maintain or defend any action in relation to its property until it has filed a copy of the articles of incorporation with the clerk of the county in which its office is located, etc., etc., does not apply to foreign corporations. *South Yuba Water & Mining Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

"Statutes forbidding the right to institute and maintain actions, except as a means of enforcing compliance by foreign corporations, with statutory conditions precedent to the right to do business in the state, are seldom, if ever, found in any state, and when used for this purpose they do not withhold from a corporation, which has failed to comply with such conditions, the right to sue for the enforcement of contracts made before the act was passed, or contracts made between other parties and assigned to them, or contracts made by them, without the state." *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664. See also §§ 5960, 5961, supra.

²³ See § 5935, supra.

In another part of this work will be found a more exhaustive consideration of the question of the prosecution of suits as constituting "doing business" in the state by foreign corporations (see subd. xiv, supra), and the effect upon its maintenance of suits of noncompliance by a foreign corporation with the statutes of a state imposing conditions upon its right to do business therein (see subd. xv).

As to actions by foreign corporations for torts, see § 5890, supra.

A suit by a foreign corporation to foreclose a mortgage cannot be defeated by showing that it has an office and has been doing business in the state without complying with a statute, unless it be further shown that the taking of the mortgage was a part of or connected with its illegal business in the state. *Bard v. Poole*, 12 N. Y. 495. And see *Ginn v. New England Mortgage Security Co.*, 92 Ala. 135, 8 So. 388.

²⁴ *Delta Bag Co. v. Kearns*, 160 Ill. App. 93.

²⁵ *McCarthy v. Alphons Custodis Chimney Const. Co.*, 125 Ill. App. 119, aff'd 219 Ill. 616, 76 N. E. 850.

When an abstract company fur

Where no federal question is involved otherwise, whether the courts of a first state will on grounds of comity sustain an action on a contract made by a corporation of a second state within the boundaries of a third state with the laws of which third state the corporation has not complied, the state court alone has authority to decide.²⁶

The effect of the inhibition by a state of the maintenance of actions in its courts by a foreign corporation upon the right of that corporation to maintain actions in the federal courts has been considered in a previous section.²⁷

§ 5996. Noncompliance as affecting right to assert counterclaim. Noncompliance by a foreign corporation with a statute prohibiting a foreign corporation from maintaining suits in the courts of the state until it has obtained a certificate of authority to do business in the state will not bar a recovery by a foreign corporation on a counterclaim growing out of the transaction on which the plaintiff sued.²⁸

nished an abstract of property to a foreign corporation which at the time had fully complied with the laws of the state, and such foreign corporation relying upon the abstract made a loan upon property in the state, but at the time when such loan was made its license to do business in the state had expired, it was held in an action against the abstract company based on such abstract being defective, that it was no defense that at the time when the loan was made such license had expired, when it appeared that at the time the mortgage was foreclosed and the action against the abstract company commenced, such foreign corporation had complied with the laws of the state. *Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774.

Under a statute providing that no foreign corporation doing business in the state shall maintain any action in the state upon any contract made by it in the state unless prior to the making of such contract it shall have procured a certificate from the secretary of state authorizing it to do business in the state, it is held that

contracts entered into by receivers of a foreign corporation which had not complied with the statute are valid and enforceable. *Meyers v. Spangenberg & McLean Co.*, 65 N. Y. Misc. 475, 120 N. Y. Supp. 174.

²⁶ *Allen v. Alleghany Co.*, 196 U. S. 458, 49 L. Ed. 551, dismissing appeal in *Allegheny Co. v. Allen*, 69 N. J. L. 270, 55 Atl. 724. See also § 5959, *supra*.

²⁷ See § 5971, *supra*.

When a state statute requires agents of a foreign corporation before entering upon the duties of their agency in the state to do certain acts, and provides that foreign corporations shall not enforce, in any court of such state, any contracts made by their agents before such compliance by such agents with the requirements of the statute, but does not invalidate any contract entered into before compliance with the statute, the prohibition of the statute will not be extended to suits brought in the federal court. *Sullivan v. Beck*, 79 Fed. 200.

See *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 7 Ann. Cas. 426.

²⁸ *J. E. Alsing Co. v. New England*

But under a statute providing that every contract made by or on behalf of a foreign corporation affecting the personal liability thereof or relating to property within the state before it shall have complied with certain prescribed conditions, shall be wholly void in its behalf, a contract which was entered into by a foreign corporation doing business in the state without having complied with such statutory conditions cannot be enforced on behalf of the foreign corporation by way of counterclaim in an action against it.²⁹

§ 5997. Presumption of compliance with statutory conditions. In some jurisdictions³⁰ it is held that in the absence of evidence to the

Quartz & Spar Co., 66 N. Y. App. Div. 473, 73 N. Y. Supp. 347.

²⁹ Rib Falls Lumber Co. v. Lesh & Matthews Lumber Co., 144 Wis. 362, 129 N. W. 595; Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N. W. 904.

In Rib Falls Lumber Co. v. Lesh & Matthews Lumber Co., 144 Wis. 362, 129 N. W. 595, the court drew a distinction between the assertion by the defendant of a counter-claim or cross-complaint and a defense which goes only to defeat the plaintiff's cause of action.

³⁰ United States. Knapp, Stout & Company v. National Mut. Fire Ins. Co., 30 Fed. 607; New England Mortgage Security Co. v. Vader, 28 Fed. 265. See LaMoine Lumber & Trading Co. v. Kesterson, 171 Fed. 980.

Arkansas. Miellmier v. Toledo Scale Co., 128 Ark. 211, 193 S. W. 497; Sidway v. Harris, 66 Ark. 387, 50 S. W. 1002; White River Lumber Co. v. Southwestern Improvement Ass'n, 55 Ark. 625, 18 S. W. 1055; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

California. Redding Gold & Copper Min. Co. v. National Surety Co., 18 Cal. App. 488, 123 Pac. 544; Reed & Co. v. Marshall, 12 Cal. App. 697, 108 Pac. 719; Bernheim Distilling Co. v.

Elmore, 12 Cal. App. 85, 106 Pac. 720.

Colorado. Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 Pac. 302; Illinois Sew. Mach. Co. v. Harrison, 43 Colo. 362, 96 Pac. 177; American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 Pac. 410; Lougee v. Wilson, 24 Colo. App. 70, 131 Pac. 777.

Dakota. Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743; American Button-Hole Overseaming & Sew. Mach. Co. v. Moore, 2 Dak. 280, 8 N. W. 131.

Delaware. Model Heating Co. v. Magarity, 25 Del. 459, L. R. A. 1915 B 665, 81 Atl. 394; Standard Sew. Mach. Co. v. Frame, 2 Pennw. 430, 48 Atl. 188.

Florida. See Farrell v. Forest Inv. Co., 74 So. 216; Holder Turpentine Co. v. M. C. Kiser Co., 68 Fla. 312, 67 So. 85.

Illinois. Hubbard-Zemurray Steamship Co. v. Crescio, 179 Ill. App. 56; Delta Bag Co. v. Kearns, 160 Ill. App. 93; F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391; Peoria Star Co. v. Steve W. Floyd Special Agency, 115 Ill. App. 401. See Spir-ella Co. v. Pagels, 162 Ill. App. 577.

Indiana. Mutual Mfg. Co. v. Alpaugh, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; Sprague v. Cutler & Savidge Lumber Co., 106 Ind. 242, 6 N. E. 335;

contrary, it will be presumed that a foreign corporation doing busi-

Cassaday v. American Ins. Co., 72 Ind. 95; **New England Fire & Marine Ins. Co. v. Robinson**, 25 Ind. 536; **C. Callahan Co. v. Wall Rice Milling Co.**, 44 Ind. App. 372, 89 N. E. 418; **Pittsburgh, C. & St. L. R. Co. v. German Ins. Co.**, 44 Ind. App. 268, 87 N. E. 995; **North Mercer Natural Gas Co. v. Smith**, 27 Ind. App. 472, 61 N. E. 10. See also **Finch v. Travellers' Ins. Co.**, 87 Ind. 302; **Singer Mfg. Co. v. Effinger**, 79 Ind. 264; **Toledo Agricultural Works v. Work**, 70 Ind. 253; **Singer Mfg. Co. v. Brown**, 64 Ind. 548; **Black v. Enterprise Ins. Co.** 33 Ind. 223.

Iowa. **McKinley-Lanning Loan & Trust Co. v. Gordon**, 113 Iowa 481, 85 N. W. 816.

Kansas. **Colean Mfg. Co. v. Johnson**, 82 Kan. 655, 20 Ann. Cas. 296, 109 Pac. 403; **Standard Stock Food Co. v. Jasper**, 76 Kan. 926, 92 Pac. 1094; **Leonard v. American Steel & Wire Co.**, 73 Kan. 79, 9 Ann. Cas. 491, 84 Pac. 553; **Jordon v. Western U. Tel. Co.**, 69 Kan. 140, 76 Pac. 396; **D. M. Osborne & Co. v. Shilling**, 68 Kan. 808, 74 Pac. 609; **Northrup v. A. G. Wills Lumber Co.**, 65 Kan. 769, 70 Pac. 879.

Louisiana. **Southern Lumber Co. v. Holt**, 129 La. 273, 55 So. 986.

Massachusetts. **Friedenwald Co. v. Warren**, 195 Mass. 432, 81 N. E. 207.

Michigan. **Lewis J. Selznick Enterprises, Inc. v. Harry I. Garson Productions**, 167 N. W. 1010; **Power Specialty Co. v. Michigan Power Co.**, 190 Mich. 699, 157 N. W. 408; **Despres, Bridges & Noel v. Zierleyn**, 163 Mich. 399, 128 N. W. 769; **Pittsburgh Coal Co. v. Northy**, 158 Mich. 530, 123 N. W. 47; **Prussian Nat. Ins. Co. v. Eisenhardt**, 153 Mich. 198, 116 N. W. 1097; **American Ins. Co. v. Cutler**, 36 Mich. 261.

Minnesota. **Mason v. Edward Thompson Co.**, 94 Minn. 472, 103 N. W. 507; **Lehigh Valley Coal Co. v. Gilmore**, 93 Minn. 432, 106 Am. St. Rep. 443, 2 Ann. Cas. 1004, 101 N. W. 796; **Rock Island Plow Co. v. Peterson**, 93 Minn. 356, 101 N. W. 616; **National Life & Trust Co. v. Gifford**, 90 Minn. 358, 96 N. W. 919.

Missouri. **Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.**, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; **United Shoe Machinery Co. v. Ramlose**, 210 Mo. 631, 109 S. W. 567; **American Ins. Co. v. Smith**, 73 Mo. 368; **Mergenthaler Linotype Co. v. Hays**, 182 Mo. App. 113, 168 S. W. 239; **Northwestern Stove Repair Co. v. Cornwall**, 148 Mo. App. 605, 128 S. W. 535; **Tribble v. Halbert**, 143 Mo. App. 524, 127 S. W. 618; **Cooper Wagon & Buggy Co. v. Cornell**, 140 Mo. App. 442, 124 S. W. 53; **Groneweg & Schmoentgen Co. v. Estes**, 139 Mo. App. 36, 119 S. W. 513; **Scientific American Club v. Horchitz**, 128 Mo. App. 575, 106 S. W. 1117; **Parlin & Orendorff Co. v. Boatman**, 84 Mo. App. 67; **New York Life Ins. Co. v. Stone**, 42 Mo. App. 383.

Montana. **Zion Co-operative Mercantile Ass'n v. Mayo**, 22 Mont. 100, 55 Pac. 915; followed in **American Hand-Sewed Shoe Co. v. O'Rourke**, 23 Mont. 530, 59 Pac. 910.

Nebraska. **J. K. Armsby Co. v. Raymond Bros.-Clarke Co.**, 90 Neb. 553, 773, 134 N. W. 174, 920; **Northern Assur. Co. v. Borgelt**, 67 Neb. 282, 93 N. W. 226, distinguishing **Commonwealth Mut. Fire Ins. Co. v. Hayden**, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

New Jersey. **Alleghany Co. v. Allen**, 69 N. J. L. 270, 55 Atl. 724, appeal dismissed **Allen v. Alleghany Co.**, 196 U. S. 458, 49 L. Ed. 551.

New York. **Charles Roome Parmele**

ness in the state has complied with the statute prescribing conditions

Co. v. Haas, 171 N. Y. 579, 64 N. E. 440, rev'g 67 App. Div. 457, 73 N. Y. Supp. 986; **Eclipse Silk Mill Co. v. Hiller**, 145 App. Div. 568, 129 N. Y. Supp. 879; **Fuller & Co. v. Schrenk**, 58 App. Div. 222, 68 N. Y. Supp. 781, aff'd 171 N. Y. 671, 64 N. E. 1126; **Barney & Smith Car Co. v. E. W. Bliss Co.**, 100 Misc. 21, 164 N. Y. Supp. 800, aff'd 178 App. Div. 919, 165 N. Y. Supp. 1076; **Singer Sew. Mach. Co. v. Foster**, 75 Misc. 641, 133 N. Y. Supp. 1072; **Harris Automatic Press Co. v. Demarest Pattern Co.**, 47 Misc. 624, 94 N. Y. Supp. 462; **F. J. Emmerich Co. v. Sloane**, 46 Misc. 513, 95 N. Y. Supp. 39; **Box Board & Lining Co. v. Vincennes Paper Co.**, 45 Misc. 1, 90 N. Y. Supp. 836; **Lehigh & N. E. R. Co. v. American Bonding & Trust Co.**, 40 Misc. 698, 83 N. Y. Supp. 191; **Reedy Elevator Co. v. American Grocery Co.**, 24 Misc. 678, 53 N. Y. Supp. 989; **O'Reilly, Skelly & Fogarty Co. v. Greene**, 18 Misc. 423, 41 N. Y. Supp. 1056; **Nicoll v. Clark**, 13 Misc. 128, 34 N. Y. Supp. 159; **American Mfg. Co. v. Weintraub**, 115 N. Y. Supp. 88. **Compare Welsbach Co. v. Norwich Gas & Electric Co.**, 96 App. Div. 52, 89 N. Y. Supp. 284, aff'd 180 N. Y. 533, 72 N. E. 1152; **American Case & Register Co. v. Griswold**, 68 Misc. 379, 125 N. Y. Supp. 4; **Chicago Crayon Co. v. Slattery**, 68 Misc. 148, 123 N. Y. Supp. 987; **Connecticut Bank v. Smith**, 9 Abb. Pr. 168, 17 How. Pr. 487; **American Ink Co. v. Riegel Sack Co.**, 141 N. Y. Supp. 549. For a further discussion of the construction and effect of the New York statute, see *infra*, this section.

North Dakota. **McConnon & Co. v. Laursen**, 22 N. D. 604, 135 N. W. 213; **Hanson v. Lindstrom**, 15 N. D. 584, 108 N. W. 798; **Stat. v. Robb-Lawrence Co.**, 15 N. D. 55, 106 N. W. 406.

Ohio. **Smith v. Weed Sew. Mach. Co.**, 26 Ohio St. 562; **Brady v. Palmer**, 19 Ohio Cir. Ct. 687. See **Toledo Commercial Co. v. Glen Mfg. Co.**, 11 Ohio Cir. Ct. 153, aff'd 55 Ohio St. 217, 45 N. E. 197.

Oklahoma. **White Sew. Mach. Co. v. Peterson**, 23 Okla. 361, 100 Pac. 513; **Keokuk Falls Improvement Co. v. Kingsland & Douglas Mfg. Co.**, 5 Okla. 32, 47 Pac. 484.

Oregon. **Big Basin Lumber Co. v. Crater Lake Co.**, 63 Ore. 359, 127 Pac. 982.

Pennsylvania. **Keystone Wrapping Mach. Co. v. Bromeier**, 42 Pa. Super. Ct. 384; **Arms Pocket-Book & Leather Novelty Co. v. Posey**, 40 Pa. Super. Ct. 361.

South Dakota. **Kelley v. R. J. Schwab & Sons**, 22 S. D. 406, 118 N. W. 696; **Acme Mercantile Agency v. Rockford**, 10 S. D. 203, 66 Am. St. Rep. 714, 72 N. W. 466.

Virginia. **Worrell & Williams v. Kinnear Mfg. Co.**, 103 Va. 719, 2 Ann. Cas. 997, 49 S. E. 988; **Nickels v. People's Building, Loan & Savings Ass'n**, 93 Va. 380, 25 S. E. 8.

Wisconsin. **W. H. Kiblinger Co. v. Sauk Bank**, 131 Wis. 595, 111 N. W. 709; **Chickering-Chase Bros. Co. v. White**, 127 Wis. 83, 106 N. W. 797.

See also § 3048, *supra*.

For proof of corporate existence of a foreign corporation, see § 429, *supra*.

It is held in the federal courts that it is unnecessary for a plaintiff foreign corporation to allege a compliance with the conditions precedent to the right of a foreign corporation to do business in the state. If a defendant wishes to avail himself of any omission or defect in this respect, he must plead it in abatement. **New England Mortgage Security Co. v. Vader**, 28 Fed. 265.

precedent to the right to do so, though in some jurisdictions it is held

"Plaintiff alleged in its complaint that it was a foreign corporation lawfully doing business in the state of Minnesota, but defendants did not answer, or at any time during the trial make the point, that it had failed to show a compliance with the statutes prescribing conditions upon which it might do business in this state. * * * The presumption is that plaintiff had complied with the law. It was clearly incumbent upon defendants affirmatively to allege in their answer a failure on the part of the plaintiff to comply with the statutes on this subject, and, having failed to do so, the defense is not available to them. The objection goes to the right of plaintiff to maintain the action, and, want of capacity not appearing on the face of the complaint, it could only be raised by an answer." *Mason v. Edward Thompson Co.*, 94 Minn. 472, 103 N. W. 507.

In *State v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406, the court said: "The presumption is in favor of their right to do business, because it is always presumed that persons will obey the law. He who asserts that there is illegality in a transaction, fair on its face, must plead and prove it. 1 Chitty, Pl. 220, 221. By reason of this general presumption in favor of legality it has been very generally held that a complaint, in an action by a foreign corporation, is not subject to demurrer for failing to allege compliance with conditions precedent to its right to do business or maintain suits. * * * We know of no good reason why that presumption does not continue as in other cases until overcome by proof. If the illegality of the contract sued on or the absence of the right to sue does not appear on the face of the complaint, the facts showing the illegality or ab-

sence of right to sue must be pleaded as a defense. If it is necessary for the defendant to plead these facts as a defense, it ought certainly to be incumbent on him to prove his allegations, unless the defensive facts are disclosed by plaintiff's proof. A defense of this nature cannot be likened to a plea of nul tiel corporation. That plea is a mere denial of the allegations of the complaint with respect to the corporate capacity of the plaintiff. The defense relied on in this case admits the corporate capacity of the plaintiff, and is available only because the plaintiff is a corporation. It does not go to the capacity of the plaintiff to sue, but to the validity of the alleged cause of action."

"We are aware that the authorities are somewhat in conflict upon this question, but this view seems to be so consonant with reason that we adopt it as establishing the better rule. This conclusion may seem in conflict with the holding of this court in *Kent & Stanley Co. v. Tuttle*, 20 Mont. 203, 50 Pac. 559, but such in fact is not the case. In that case it was alleged in the answer, and admitted in the reply, that the plaintiff was engaged in merchandising in the state of Montana, but had never complied with the laws of this state under which foreign corporations become entitled to do business here. Under this condition of the pleadings this court held that it was the duty of the plaintiff to show upon what its claim was based, so that the character of the transaction could be passed upon. In other words, it appearing that it was a foreign corporation engaged in business in this state, it was incumbent upon it to show that at the time the contract was made it was engaged in interstate commerce. In the case under consideration it appears *prima*

that the burden of proof is upon the defendant.³¹ Thus where it was stated in the complaint filed in an action by a foreign corporation that it was a foreign corporation and did business in the state it was held not to be necessary to state in the complaint that the plaintiff had complied with the conditions upon which it could do business and had the right to make the contract in the state, as until it otherwise appeared, the law presumed that it was not made in violation of the statutes or constitution of the state.³² And it is held that a court will presume, *prima facie*, that a corporation doing business in the state has complied with the statutory requisites to its right to do so, and that lack of capacity on its part to institute suit must appear affirmatively on the face of its petition in order to subject the petition to demurrer for that reason, and that, therefore, a petition

facie that at the time the contract was made the plaintiff was engaged in interstate commerce, and it, therefore, by its allegations, brings itself within the case of *McNaughton Co. v. McGirl*, 20 Mont. 124; for it appears that at the time the contract in question herein was made the plaintiff was doing business in the state of Utah, and was shipping the products of the state of Idaho into the state of Montana for sale.' *Zion Co-operative Mercantile Ass'n v. Mayo*, 22 Mont. 100, 55 Pac. 915.

Under a statute providing that foreign corporations which have not complied with the foreign corporation act shall not be entitled to maintain any action in the courts of the state, and that a failure of foreign corporation plaintiff in such respect may be pleaded in abatement in any action, suit or proceeding brought by it, it has been held in a federal court that such failure will not affect its jurisdiction in a pending suit, as it is a matter which the defendant is at liberty either to raise or waive. *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 7 Ann. Cas. 426.

The burden is said to be on the corporation where the issue is raised by the pleadings, in which case the

corporation has the burden of showing compliance. *Washington County Mut. Ins. Co. v. Chamberlain*, 16 Gray (Mass.) 165, disapproved in *State v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406.

³¹ *D. M. Osborne v. Shilling*, 68 Kan. 808, 74 Pac. 609; *Coppedge v. M. K. Götze Brewing Co.*, 67 Kan. 851, 73 Pac. 908; *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879.

Where an answer avers that the plaintiff is a foreign corporation and has failed to comply with the statutory conditions imposed upon a foreign corporation as a condition precedent to its right to do business in the state, the burden of proof is upon the defendant to establish the lack of capacity to sue on the part of the plaintiff. *Leonard v. American Steel & Wire Co.*, 73 Kan. 79, 9 Ann. Cas. 491, 84 Pac. 553; *D. M. Osborne & Co. v. Shilling*, 68 Kan. 808, 74 Pac. 609; *Thomas v. Remington Paper Co.*, 67 Kan. 599, 73 Pac. 909.

³² *White River Lumber Co. v. Southwestern Improvement Co.*, 55 Ark. 625, 18 S. W. 1055; *St. Louis, A. & T. Ry. Co. v. Fire Ass'n*, 55 Ark. 163, 18 S. W. 43. See also *Studebaker Harness Co. v. Gerlach Mercantile Co.*, — Tex. Civ. App. —, 192 S. W. 545.

which merely fails to allege that the corporation has complied with the requirements of a statute entitling it to sue, but which does not admit expressly or inferentially that it has failed to make such compliance, is not demurrable for lack of legal capacity in the plaintiff to bring the action.³³ When a simple allegation in the complaint is that the plaintiff is a foreign corporation duly organized and created under the laws of another state and it does not appear that the plaintiff is engaged in business in the state, or ever has been, or that the alleged cause of action grew out of any business transacted in the state at any time, it is held that it is unnecessary to allege a compliance by the foreign corporation with a statute which does not apply to a corporation which has not transacted business in the state and does not intend to, or to a corporation that is simply attempting to collect in the courts of such state the obligation of one of its citizens.³⁴ But where the record discloses affirmatively that the plaintiff is a foreign corporation and has been doing business in the state without complying with the conditions prescribed by the statute, a demurrer is properly sustained, if, under such statute, a foreign corporation not having complied with such conditions either has no cause of action or is not entitled to maintain an action in the courts of the state.³⁵

³³ *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879. See also *Southern Lumber Co. v. Holt*, 129 La. 273, 55 So. 986.

Where the petition discloses that the plaintiff was a foreign corporation, but does not show that it has not complied with the requirements of the statute, it is held that the fact of noncompliance is defensive matter, and, to be availed of, must be pleaded. *Jordon v. Western U. Tel. Co.*, 69 Kan. 140, 76 Pac. 396.

³⁴ *National Life & Trust Co. v. Gifford*, 90 Minn. 358, 96 N. W. 919.

Where an answer alleges that the plaintiff is a foreign corporation and failed in certain particulars to comply with the statutory conditions precedent to the right of a foreign corporation to do business in the state, and the reply consists of a general denial, the burden of proof is upon the defendant to show the plaintiff's lack of capacity to sue. *D. M. Osborne*

& *Co. v. Shilling*, 68 Kan. 808, 74 Pac. 609, citing *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879.

The fact that a foreign corporation is not authorized to do business in the state is a matter to be raised by answer and need not be proven by the corporation plaintiff, even though the complaint alleges that the plaintiff has complied with the laws of the state in respect to doing business therein, as such allegation will be treated as surplusage. *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798.

³⁵ *Valley Lumber & Manufacturing Co. v. Driessel*, 13 Idaho 662, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63, 93 Pac. 765; *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226; *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; *Union Trust Co. of Rochester v. Sickels*, 125 N. Y. App.

But where it does not appear affirmatively that the plaintiff has done business in the state in contravention of the statutes, a demurrer will not lie because the complaint or petition fails to allege that the statutory conditions have been complied with. In such cases noncompliance is a defense to be set up by answer.³⁶ Where the complaint of a foreign corporation plaintiff alleged its compliance with the laws of the state and the consequent right of the plaintiff to do business in the state and the answer of the defendant specifically admitted such compliance, the right of the plaintiff to sue on a contract made in the state is established.³⁷

While the general rule as to the presumption of compliance by the foreign corporation with the statutory requirements seems to be in accord with the better reasoning, certain courts have held that in a suit by a foreign corporation the complaint, petition or declaration must set forth the compliance by the foreign corporation with the conditions imposed upon foreign corporations as a condition precedent to the right to do business in the state, and such compliance must be proved by the plaintiff.³⁸ Thus under a Texas statute requiring

Div. 105, 109 N. Y. Supp. 262; *Emmerich Co. v. Sloane*, 108 N. Y. App. Div. 330, 95 N. Y. Supp. 39, 1129.

Under a statute requiring a foreign corporation to procure a permit to do business in the state and providing that no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of the state, whether arising out of contract or tort, unless at the time such contract was made or tort committed, the corporation had filed its articles of incorporation, under the provisions of the statute, in the office of the secretary of state for the purpose of procuring its permit, it is held that where the petition discloses that plaintiff is a foreign corporation, and that its claim and demand grows out of business transacted by it in the state, and fails to show that it has a permit to do business, as required by the statute, the court properly sustained a demurrer to the petition and dismissed the suit. *Peck Hammond Co. v. Hamilton Independent School Dist.*,

— Tex. Civ. App. —, 181 S. W. 697.

³⁶ *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226.

³⁷ *United Bldg. Material Co. v. Odell*, 67 N. Y. Misc. 584, 123 N. Y. Supp. 313.

³⁸ *Alabama*. *Singleton v. United States Fidelity & Guaranty Co.*, 195 Ala. 506, 70 So. 169; *Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co.*, 167 Ala. 557, 52 So. 751; *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600; *Christian v. American Freehold Land & Mortgage Co.*, 89 Ala. 198, 7 So. 427; *Mullens v. American Freehold Land Mortgage Co.*, 88 Ala. 280, 7 So. 201; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200.

Idaho. *Consolidated Wagon & Machine Co. v. Kent*, 23 Idaho 690, 132 Pac. 305; *Bonham Nat. Bank of Fairbury v. Grimes Pass Placer Min. Co.*, 18 Idaho 629, 111 Pac. 1078; *Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 Pac. 14; *Valley Lumber & Manufacturing*

a foreign corporation desiring to transact business in the state to

Co. v. Nickerson, 13 Idaho 682, 93 Pac. 24; *Valley Lumber & Manufacturing Co. v. Driessel*, 13 Idaho 662, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63, 93 Pac. 765.

Nevada. See *Symons-Kraussman Co. v. Reno Wholesale Liquor Co.*, 32 Nev. 241, 107 Pac. 96.

Tennessee. *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Cumberland Land Co. v. Canter Lumber Co.* (Tenn. Ch. App.), 35 S. W. 886. See *Jung Brewing Co. v. Levisy* (Tenn. Ch. App.), 37 S. W. 889.

Texas. *Taber v. Interstate Building & Loan Co.*, 91 Tex. 92, 40 S. W. 954; *Crews & Williams v. Gullett Gin Co.*, — Tex. Civ. App. —, 189 S. W. 793; *Latham Co. v. Louer Bros.*, — Tex. Civ. App. —, 176 S. W. 920; *Blackwell-Wielandy Book & Stationery Co. v. Perry*, — Tex. Civ. App. —, 174 S. W. 935; *Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works*, 62 Tex. Civ. App. 422, 131 S. W. 415; *Turner v. National Cotton Oil Co.*, 50 Tex. Civ. App. 468, 109 S. W. 1112; *Heisig Rice Co. v. Fairbanks, Morse & Co.*, 45 Tex. Civ. App. 383, 100 S. W. 959; *St. Louis Expanded Metal Fireproofing Co. v. Beilharz* (Tex. Civ. App.), 88 S. W. 512; *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969; *Peters v. Anheuser-Busch Brewing Co.* (Tex. Civ. App.), 55 S. W. 516; *Home Forum Benefit Order of Illinois v. Jones*, 20 Tex. Civ. App. 68, 48 S. W. 219; *Mansur & Tebbetts Implement Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972; *Southern Building & Loan Ass'n v. Skinner* (Tex. Civ. App.), 42 S. W. 320; *Youngblood v. Strahorn-Hutton-Evans Commission Co.* (Tex. Civ. App.), 40 S. W. 648; *Huffman v. Western Mortg. & Inv. Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306. Compare *Brin v. Wachusett Shirt Co.* (Tex.

Civ. App.), 43 S. W. 295; *Miller v. Goodman*, 15 Tex. Civ. App. 244, 40 S. W. 743.

Vermont. *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526.

The Supreme Court of Texas, in *Taber v. Interstate Building & Loan Ass'n*, 91 Tex. 92, 40 S. W. 954, said: "Every state has the right to prescribe the terms upon which any corporation created in another state or foreign country may do business within its limits, and may exclude such corporations entirely, with the exception of corporations engaged in interstate commerce, or such as are employed by the United States in the transaction of its business. Under this rule of law, about which there is no controversy, this state had the right to adopt such measures as it thought fit to enforce the provisions of its law, which required foreign corporations to deposit the articles of their incorporation with the secretary of state; and the legislature having seen fit to prescribe such a condition to the maintenance of suits in its courts that such compliance should precede the transaction of business in the state, it follows that the filing of its articles of incorporation with the secretary of state is a condition precedent to the maintenance of suit upon any contract or right of action accruing to such foreign corporation; and, it being a condition precedent, the fact must be both alleged and proved to entitle the corporation to judgment in such case."

For allegation of compliance by foreign corporation plaintiff with statutory requirements held to be sufficient, see *Sloss-Sheffield Steel & Iron Co. v. Maryland Casualty Co.*, 167 Ala. 557, 52 So. 751.

In *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743, it was said: "In order to entitle the

file with the secretary of state a copy of its charter and procure from him a permit, and providing that no foreign corporation shall maintain any suit in any court of the state upon any demand, whether arising out of contract or tort, unless, at the time such contract was made or tort committed, the corporation had so filed its charter for the purpose of securing the permit, it was held that a foreign corporation must plead and prove that it has complied with such statute before it will be entitled to judgment.³⁹ Where the petition does not disclose that the transaction involved constituted doing business in the state, it is held that it is not necessary under such statute for the plaintiff to allege that it had complied with the conditions requisite to enable it to do business in the state.⁴⁰ In Alabama the provision

complainant to any relief, it must show affirmatively that it had complied with the law. Until that is done all its transactions are illegal. The burden of proof being upon it, the court can presume nothing in its favor, and can only hold such of its contracts enforceable as it shows were made after it had complied with the law enabling it to make a valid contract and to transact business." Quoted with approval in *Turner v. National Cotton Oil Co.*, 50 Tex. Civ. App. 468, 109 S. W. 1112.

³⁹ *Taber v. Interstate Building & Loan Ass'n*, 91 Tex. 92, 40 S. W. 954; *Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works*, 62 Tex. Civ. App. 422, 131 S. W. 415; *San Antonio v. Salvation Army (Tex. Civ. App.)*, 127 S. W. 860; *Turner v. National Cotton Oil Co.*, 50 Tex. Civ. App. 468, 109 S. W. 1112; *St. Louis Expanded Metal Fireproofing Co. v. Beilharz (Tex. Civ. App.)*, 88 S. W. 512; *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969; *Peters v. Anheuser-Busch Brewing Ass'n (Tex. Civ. App.)*, 55 S. W. 516; *Delaware Ins. Co. v. Security Co. (Tex. Civ. App.)*, 54 S. W. 916; *Mansur & Tebbetts Implement Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972.

See, however, *Miller v. Goodman*,

15 Tex. Civ. App. 244, 40 S. W. 743, where it was held the petition need not allege that the plaintiff foreign corporation had complied with the statute, but that it devolved on the defendants to allege and prove that the corporation had not complied with the requirements of the statute. The Court of Civil Appeals certified to the Supreme Court the question of the necessity of plaintiff's alleging and proving compliance on the part of the corporation with the statute requiring foreign corporations to obtain a permit to do business in the state. The ruling of the Supreme Court was that the transaction in question was interstate commerce, and the statute had no application. See *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718. On rehearing, the Court of Civil Appeals stated that this did not work any change in its holding that it was not essential for the plaintiff to make the allegation and proof. See also *Allen v. Tyson-Jones Buggy Co. (Tex. Civ. App.)*, 40 S. W. 740. These cases, however, were overruled in *Taber v. Interstate Building & Loan Ass'n*, 91 Tex. 92, 40 S. W. 954.

⁴⁰ *Barcus v. J. I. Case Threshing Mach. Co.*, — Tex. Civ. App. —, 197 S. W. 478; *Studebaker Harness Co. v. Gerlach Mercantile Co.*, — Tex. Civ. App. —, 192 S. W. 545; *Crews & Wil-*

of the Constitution of that state prohibiting a foreign corporation from doing any business in that state without having at least one known place of business and an authorized agent or agents therein, and the statute enacted in aid in execution of the Constitution, are held to be prohibitory, rendering it unlawful for a foreign corporation, without compliance with the prescribed conditions, to transact any business in the state, and that all contracts into which it might enter, while executory, requiring the aid of the courts to enforce them, are void,⁴¹ and it now seems settled in that state that in suits in equity by a foreign corporation for the foreclosure of mortgages executed in Alabama or for the enforcement of contracts made in that state, the bill is demurrable unless it contains an express averment that, at the time of making such contract, the corporation had a known place of business in the state and an authorized agent therein.⁴²

Liams v. Gullett Gin Co., — Tex. Civ. App. —, 189 S. W. 793; *Blackwell-Wielandy Book & Stationery Co. v. Perry*, — Tex. Civ. App. —, 174 S. W. 935; *First State Bank of Teague v. Hadden*, — Tex. Civ. App. —, 158 S. W. 1168; *Adams v. Gray & Dudley Hardware Co.*, — Tex. Civ. App. —, 153 S. W. 650; *New State Land Co. v. Wilson*, — Tex. Civ. App. —, 150 S. W. 253; *Panhandle Telephone & Telegraph Co. v. Kellogg Switchboard & Supply Co.*, 62 Tex. Civ. App. 402, 132 S. W. 963; *Brin v. Wachusett Shirt Co.* (Tex. Civ. App.), 43 S. W. 295.

Under such statute it was held in an action by a foreign corporation to recover the purchase price of goods sold to a resident of the state, that the petition need not allege that the plaintiff corporation had complied with the requirements of such statute, where there is nothing in the petition to show that the plaintiff was transacting or soliciting business in the state, for it would under such circumstances be presumed that the transaction occurred in another state, and would be interstate commerce, and hence the statute requiring the plaintiff to procure a permit to do business in the state, would not apply.

Brin v. Wachusett Shirt Co. (Tex. Civ. App.), 43 S. W. 295.

In a suit for the balance of the purchase price of goods manufactured by a foreign corporation in the state of its domicile and shipped therefrom to the purchaser in Texas—the transaction being interstate commerce—it need not be alleged by the plaintiff foreign corporation in its petition or proven by it that it had secured the requisite permit to do business in the state. *Heisig Rice Co. v. Fairbanks, Morse & Co.*, 45 Tex. Civ. App. 383, 100 S. W. 959; *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969.

See also *Gulf & I. Ry. Co. v. Southwestern Coal Selling Co.* (Tex. Civ. App.), 105 S. W. 64, holding that where the petition indicated that the transaction was interstate commerce, an objection that it did not appear that the foreign corporation plaintiff had complied with the statutory requirements was untenable.

⁴¹ *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600. See also § 5904, *supra*.

⁴² *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600; *Ginn v. New England Mortgage Security Co.*, 92 Ala. 135, 8 So. 388; *Christian v. American Freehold Land & Mortgage Co.*, 89 Ala.

Under a New York statute providing that no foreign corporation

198, 7 So. 427; *Mullens v. American Freehold Land Mortg. Co.*, 88 Ala. 280, 7 So. 201; *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200.

"It is doubtless true, as a general rule, that the law presumes the contracts of corporations, like the contracts of natural persons, are legal. But it is a cardinal rule of pleading in equity, as has been said by this court, founded in reason and good sense, that a bill must show the complainant's title to relief, with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend. Matters essential to the complainant's right to relief must appear, not by inference, but by direct and unambiguous averment. * * * When the constitution ordains that no foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and the legislature prescribes the mode in which the corporation shall make known to the public a designated place of business in this state, and who is or are its authorized agent or agents thereat, obedience to the constitution and the statute becomes a condition precedent to the transaction in the state. Whether there has or has not been performance of the condition is a fact lying peculiarly within corporate knowledge. It is a fact essential to a right of recovery, whenever relief is sought because of corporate transactions had within the state, and it must appear, not by inference or presumption, but by direct, unambiguous averment. It is one thing to presume in favor of

the legality of the contracts of corporations or of natural persons, and quite another, and essentially a different thing, to presume that either have performed constitutional or statutory requirements, when performance is of the essence of the capacity to contract. We regard the rule of pleading, established in the cases to which we have referred as founded in reason and good sense, in conformity to the cardinal rules of equity pleading, and we are unwilling to modify or depart from it." *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600.

In *Nelms v. Edinburgh-American Land Mortgage Co.*, 92 Ala. 135, 157, 9 So. 141, *Coleman, J.*, disapproved of the above rule laid down in *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200, and *Mullens v. American Freehold Land Mortgage Co.*, 88 Ala. 280, 7 So. 201, and expressed the opinion, concurred in by some of the other judges, that in equity noncompliance with the statute was properly a matter of defense. In *Sullivan v. Vernon*, 121 Ala. 393, 25 So. 600, in reaffirming the doctrine laid down in *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 7 So. 200, the court said: "We have not apprehended that it was intended to overrule or depart from these cases by the decision in *Nelms v. Edinburgh-American Land Mortg. Co.*, 92 Ala. 157, * * *. Upon that point, the opinion manifests a difference of opinion among the members of the court as then constituted, some dissenting from the rule of pleading declared in the cases to which reference has been made. The precise question we have here under consideration was presented neither by the pleadings nor by the facts in that case. It shows that only two grounds of demurrer to the bill were considered by the court, and

doing business in the state shall maintain any action in the state upon any contract made by it in the state unless prior to the making of the contract it shall have procured a certificate that it has complied with all the requirements of the law to authorize it to do business in the state and may lawfully carry on its business in the state, it was held that where the complaint shows that the contract was made in the state, the complainant must allege and prove that it has complied with the statute and that a complaint which fails to allege such compliance is demurrable.⁴³ Where it does not appear on the face of the

neither of which presented the question now before us. * * * In fact, the bill in that case distinctly averred a compliance on the part of the complainant corporation, with the constitutional and statutory requirements as to foreign corporations having a known place of business, and a designated agent thereat, within the state. It follows, therefore, that what was said in that case, as to dissenting from the rule laid down by this court in the case of *Farrior v. New England Mortg. Security Co.*, and *Christian v. American Freehold Land Mortgage Co.*, *supra*, can but be regarded as dictum, and we now reaffirm the rule as announced in those cases."

Under the Alabama statute, a bill which alleges that complainant "is a corporation organized and existing under the laws of the state of Maryland, with its principal office and place of business in the city of Baltimore, state of Maryland, and that one of the purposes for which it was organized was the making, as surety, of official and other bonds for public officers and private persons; that it has complied with all the laws of the state of Alabama with reference to foreign corporations engaged in the business in which your orator is engaged, and is qualified to carry on its business in the state of Alabama, and was so qualified in November, 1904, at the time it became surety on the official bond of A. E. Singleton, as judge

of probate of Bullock County, Alabama, hereinafter referred to, and has been so qualified from that time on down to the present time," is sufficient. *Singleton v. United States Fidelity & Guaranty Co.*, 195 Ala. 506, 70 So. 169; *Sloss Steel & Iron Co. v. Maryland Casualty Co.*, 167 Ala. 557, 52 So. 751.

As to the insufficiency of a plea in an action of assumpsit which alleges that plaintiff is a corporation and "is a nonresident of the state of Alabama, and that the plaintiff has no license to do business in the state of Alabama as a foreign corporation, and that the matter and things sued on in said cause took place in the state of Alabama, and that said account" accrued in Alabama, see *Ewart Lumber Co. v. American Cement Plaster Co.*, 9 Ala. App. 152, 62 So. 560.

⁴³ *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26, rev'g 113 N. Y. App. Div. 382, 98 N. Y. Supp. 909; *Halsey v. Henry Jewett Dramatic Club*, 190 N. Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25; *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21, following *Welsbach Co. v. Norwich Gas & Electric Co.*, 180 N. Y. 533, 72 N. E. 1152, aff'g 96 N. Y. App. Div. 52, 89 N. Y. Supp. 284, and construing N. Y. Gen. Corp. Law, § 15; *Angldile Computing Scale Co. v. Gladstone*, 164 N. Y. App. Div. 370, 149 N. Y. Supp. 807; *Frick Co. v. Pultz*, 162 N. Y. App. Div. 209, 147 N. Y. Supp. 732; *Acorn*

complaint that the foreign corporation plaintiff was doing business

Brass Mfg. Co. v. Rutenberg, 147 N. Y. App. Div. 533, 132 N. Y. Supp. 600; **Manufacturers' Commercial Co. v. Blitz**, 131 N. Y. App. Div. 17, 115 N. Y. Supp. 402; **Union Trust Co. of Rochester v. Sickels**, 125 N. Y. App. Div. 105, 109 N. Y. Supp. 262; **Portland Co. v. Hall & Grant Const. Co.**, 123 N. Y. App. Div. 495, 108 N. Y. Supp. 821, 121 N. Y. App. Div. 779, 106 N. Y. Supp. 649; **Barney & Smith Car Co. v. E. W. Bliss Co.**, 100 N. Y. Misc. 21, 164 N. Y. Supp. 800, aff'd, 178 N. Y. App. Div. 919, 165 N. Y. Supp. 1076; **Dan Talmage's Sons Co. v. American Dock Co.**, 93 N. Y. Misc. 535, 157 N. Y. Supp. 445; **American Ink Co. v. Riegel Sack Co.**, 79 N. Y. Misc. 421, 140 N. Y. Supp. 107, aff'g 141 N. Y. Supp. 549; **American Case & Register Co. v. Griswold**, 68 N. Y. Misc. 379, 125 N. Y. Supp. 4; **Chicago Crayon Co. v. Slaterry**, 68 N. Y. Misc. 143, 123 N. Y. Supp. 987; **United Bldg. Material Co. v. Odell**, 67 N. Y. Misc. 584, 123 N. Y. Supp. 313; **Warner Instrument Co. v. Sweet**, 65 N. Y. Misc. 57, 119 N. Y. Supp. 166; **Pittsburgh Plate Glass Co. v. Ravitch**, 58 N. Y. Misc. 191, 108 N. Y. Supp. 1103; **Wilson & Co. v. Bazaar**, 168 N. Y. Supp. 188; **Knickerbocker Guide Co. v. Fairfax**, 111 N. Y. Supp. 814; **G. & J. Tire Co. v. Van Hoff**, 111 N. Y. Supp. 647.

In **Wood & Selick v. Ball**, 190 N. Y. 217, 83 N. E. 21, the court said: "We think that compliance with section 15 of the General Corporation Law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this state. The cases holding otherwise should be regarded as overruled and the conflict of authority ended." See, however, dissenting opinion of O'Brien, J.

For cases holding to the contrary, see **W. P. Fuller & Co. v. Schrenk**, 171

N. Y. 671, 64 N. E. 1126, aff'g 58 N. Y. App. Div. 222, 68 N. Y. Supp. 781; **International Society v. Dennis**, 76 N. Y. App. Div. 327, 78 N. Y. Supp. 497; **St. George Vineyard Co. v. Fritz**, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775; **Lehigh & N. E. R. Co. v. American Bonding & Trust Co.**, 40 N. Y. Misc. 698, 83 N. Y. Supp. 191; **O'Reilly, Skelly & Fogarty Co. v. Greene**, 18 N. Y. Misc. 423, 41 N. Y. Supp. 1056.

It is held that such an allegation, being essential in order to set forth a cause of action, the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by the failure to raise it by demurrer or answer. **Wood & Selick v. Ball**, 190 N. Y. 217, 83 N. E. 21, citing N. Y. Code Civ. Proc. § 499; **Dan Talmage's Sons Co. v. American Dock Co.**, 93 N. Y. Misc. 535, 157 N. Y. Supp. 445. But see **Barney & Smith Car Co. v. E. W. Bliss Co.**, 100 N. Y. Misc. 21, 164 N. Y. Supp. 800.

A foreign corporation when sued by another foreign corporation on a contract made in the state may waive the right to object that the plaintiff had not complied with the laws of the state and procured the necessary certificate of compliance, and it may do so by disclaiming any intention of moving to dismiss the action for want of jurisdiction and waiving any right to object. **Barney & Smith Car Co. v. E. W. Bliss Co.**, 100 N. Y. Misc. 21, 164 N. Y. Supp. 800, aff'd 178 N. Y. App. Div. 919, 165 N. Y. Supp. 1076.

It is held by a federal court sitting in New York that although a foreign corporation is doing business in that state without having complied with and secured a certificate of authority to do business under N. Y. General Corporation Law, § 15, it may, nevertheless obtain an injunction to prevent a domestic corporation from

in the state, the complaint is not demurrable for failure to allege that the plaintiff has complied with the requirements of the statute and procured the requisite certificate.⁴⁴

A different conclusion is reached in New York in reference to a statute of that state requiring every foreign corporation authorized to do business under the general corporation law to pay a license fee for the privilege of carrying on business in the state, to be computed upon the basis of the capital stock employed by it within the state during the first year of carrying on its business in the state and to vary according to circumstances, and providing that no action shall be maintained or recovery had in any of the courts of the state by such foreign corporation without obtaining a receipt for such license fee within a prescribed time, varying according to certain conditions. Such a statute is held to be a revenue act, and the amount to be paid thereunder cannot be ascertained in advance, and noncompliance therewith is held to be a matter of defense, to be availed of by answer.⁴⁵

using a name adopted by it with knowledge that it was similar to the name of the foreign corporation. *Mutual Export & Import Corporation v. Mutual Export & Import Corporation of America*, 241 Fed. 137.

See also *Hoevel Sandblast Mach. Co. v. Hoevel*, 167 N. Y. App. Div. 548, 153 N. Y. Supp. 35, holding that a foreign corporation may protect itself by injunction against a domestic corporation using the same name as the foreign corporation, although the latter had not complied with General Corp. Law, § 15, and Tax Law, § 181, until after the formation of the domestic corporation. And see § 736, *supra*.

Where the complaint in an action on a contract alleges that the plaintiff is a foreign corporation and is duly authorized to do business in the state and such allegations are specifically denied by the defendant, it will be presumed that it is a stock corporation and the plaintiff must plead and prove compliance with §§ 15 and 16 N. Y. Gen. Corp. Law. *E. A. Strout Farm Agency v. Hunter*, 85 N. Y. Misc. 476, 148 N. Y. Supp. 924.

⁴⁴ *Frick Co. v. Pultz*, 162 N. Y. App.

Div. 209, 147 N. Y. Supp. 732; *Alpha Portland Cement Co. v. Schratwieser Fireproof Const. Co.*, 146 N. Y. App. Div. 571, 131 N. Y. Supp. 142; *Union Trust Co. of Rochester v. Siekels*, 125 N. Y. App. Div. 105, 109 N. Y. Supp. 262; *Ozark Cooperage Co. v. Quaker City Cooperage Co.*, 112 N. Y. App. Div. 62, 98 N. Y. Supp. 113; *E. H. Stafford Mfg. Co. v. Newman*, 75 N. Y. Misc. 636, 133 N. Y. Supp. 1073.

Where it does not appear that the contract which is the basis of the action was made in the state, the defense of noncompliance with the statute must be specifically pleaded. *Angdile Computing Scale Co. v. Gladstone*, 164 N. Y. App. Div. 370, 149 N. Y. Supp. 807.

⁴⁵ *Halsey v. Henry Jewett Dramatic Co.*, 190 N. Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25; *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21, following *Charles Roome Parmele Co. v. Haas*, 171 N. Y. 579, 64 N. E. 440, rev'g 67 N. Y. App. Div. 457; 73 N. Y. Supp. 986; *Chicago Crayon Co. v. Slattery*, 68 N. Y. Misc. 148, 123 N. Y. Supp. 987.

It is held that the objection that

By observing the distinction between the two statutes the seeming conflict in the New York cases, which might appear at a casual reading, is cleared up, and it will be found that the later New York cases are not in conflict but that each rests upon a statute peculiar to itself, which differs so essentially from that governing the others as to effect a different purpose and call for the application of a different rule of pleading.⁴⁶

§ 5998. Manner of raising defense of noncompliance by foreign corporation. As has been stated elsewhere, by the decided weight of authority, the failure of a foreign corporation to comply with the statutory conditions precedent to its right to do business in a state, is a matter of defense.⁴⁷ It follows, therefore, that in the jurisdictions where this rule obtains, it is not necessary in an action by a foreign corporation for it to allege a compliance by it with the statutory conditions precedent to its right to do business in the state, as such compliance will be presumed, and if a defendant wishes to avail himself of any omission or defect in this respect, he must plead the same.⁴⁸

the foreign corporation has not complied with the statute is, at most, one as to the character or capacity of the plaintiff to sue, and that objection, if the defect appears upon the face of the complaint, must be taken by demurrer, and if it does not appear upon the face of the complaint, it must be taken by answer, and if not taken either by demurrer or answer is deemed to have been waived. *Charles Roome Parmele Co. v. Haas*, 171 N. Y. 579, 64 N. E. 440, rev'g 67 N. Y. App. Div. 457, 73 N. Y. Supp. 986.

Failure to allege compliance with the statute requiring a license is not available by demurrer. *Chicago Crayon Co. v. Slaterry*, 68 N. Y. Misc. 148, 123 N. Y. Supp. 987.

When a defendant desires to interpose the defense that the license fee has not been paid as required by such statute, the answer should allege that the license fee has been assessed by the proper officer, and that more than the prescribed time had elapsed before the license fee was paid. *Halsey v. Henry Jewett Dramatic Co.*, 190 N.

Y. 231, 123 Am. St. Rep. 546, 83 N. E. 25.

⁴⁶ See *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21.

⁴⁷ See § 5997, *supra*.

As to the pleading of compliance with statutory conditions, see § 3048, *supra*.

⁴⁸ *United States. National Carbon Paint Co. v. Fred Bredel Co.*, 193 Fed. 897; *Tacony Iron Co. v. Sloss-Sheffield Steel & Iron Co.*, 188 Fed. 896, aff'g 183 Fed. 645; *La Moine Lumber & Trading Co. v. Kesterson*, 171 Fed. 980; *New England Mortgage Security Co. v. Vader*, 28 Fed. 265.

California. Reed & Co. v. Harshall, 12 Cal. App. 697, 108 Pac. 719.

Colorado. Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 Pac. 302; *Illinois Sew. Mach. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177; *Lougee v. Wilson*, 24 Colo. App. 70, 131 Pac. 777.

Dakota. Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743; *American Button-Hole Overseaming & Sewing Machine Co. v. Moore*, 2 Dak.

Such a defense is not raised by a general denial in the answer, but

280, 8 N. W. 131, quoted with approval and followed in Keokuk Falls Improvement Co. v. Kingsland & Douglas Mfg. Co., 5 Okla. 32, 47 Pac. 484.

District of Columbia. Stone v. Chesapeake & C. Inv. Co., 15 App. Cas. 585.

Florida. Farrell v. Forest Inv. Co., 74 So. 216; Holder Turpentine Co. v. M. C. Kiser Co., 68 Fla. 312, 67 So. 85.

Illinois. Delta Bag Co. v. Kearns, 160 Ill. App. 93; Leman v. United States Fidelity & Guaranty Co., 137 Ill. App. 258; F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391.

Indiana. Mutual Mfg. Co. v. Alpaugh, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; Sprague v. Cutler & Savidge Lumber Co., 106 Ind. 242, 6 N. E. 335; Singer Mfg. Co. v. Brown, 64 Ind. 548; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Brown-Ketcham Iron Works v. George B. Swift Co., 53 Ind. App. 630, 100 N. E. 584, 860; C. Callahan Co. v. Wall Rice Milling Co., 44 Ind. App. 372, 89 N. E. 418; North Mercer Natural Gas Co. v. Smith, 27 Ind. App. 472, 61 N. E. 10.

Kansas. Standard Stock Food Co. v. Jasper, 76 Kan. 926, 92 Pac. 1094.

Kentucky. Kirk-Christy Co. v. American Ass'n, 32 Ky. L. Rep. 1177, 108 S. W. 232.

Maryland. Aetna Indemnity Co. v. George A. Fuller Co., 111 Md. 321, 74 Atl. 369, 73 Atl. 738; Universal Life Ins. Co. v. Bachus, 51 Md. 28.

Massachusetts. National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510, 82 N. E. 671; Friedenwald Co. v. Warren, 195 Mass. 432, 81 N. E. 207.

Michigan. Lewis J. Selznick Enterprises, Inc. v. Harry I. Garson Productions, 167 N. W. 1010; Power Spe-

cialty Co. v. Michigan Power Co., 190 Mich. 699, 157 N. W. 408; Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399, 128 N. W. 769; Pittsburgh Coal Co. v. Northy, 158 Mich. 530, 123 N. W. 47; American Ins. Co. v. Cutler, 36 Mich. 261.

Minnesota. Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 106 Am. St. Rep. 443, 2 Ann. Cas. 1004, 101 N. W. 796; National Life & Trust Co. v. Gifford, 90 Minn. 358, 96 N. W. 919.

Missouri. Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567; Mergenthaler Linotype Co. v. Hays, 182 Mo. App. 113, 168 S. W. 239; Tribble v. Halbert, 143 Mo. App. 524, 127 S. W. 618; Groneweg & Schmoentgen Co. v. Estes, 139 Mo. App. 36, 119 S. W. 513; Scientific American Club v. Horchitz, 128 Mo. App. 575, 106 S. W. 1117; Parlin & Orendorff Co. v. Boatman, 84 Mo. App. 67; New York Life Ins. Co. v. Stone, 42 Mo. App. 383.

Montana. American Hand-Sewed Shoe Co. v. O'Rourke, 23 Mont. 530, 59 Pac. 910; Zion Co-operative Mercantile Ass'n v. Mayo, 22 Mont. 100, 55 Pac. 915.

Nebraska. J. K. Armsby Co. v. Raymond Bros.-Clarke Co., 90 Neb. 553, 134 N. W. 174; Northern Assur. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226.

New York. Charles Roome Parmelee Co. v. Haas, 171 N. Y. 579, 64 N. E. 440, aff'g 67 App. Div. 457, 73 N. Y. Supp. 986; St. George Vineyard Co. v. Fritz, 48 App. Div. 233, 62 N. Y. Supp. 775; Chicago Crayon Co. v. Slattery, 68 Misc. 148, 123 N. Y. Supp. 987; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360; Nicoll v. Clark, 13 Misc. 128, 34 N. Y. Supp. 159.

it is necessary that the defense shall be specially pleaded.⁴⁹

North Dakota. *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798; *State v. Robb-Lawrence Co.*, 15 N. D. 55, 106 N. W. 406.

Ohio. *Smith v. Weed Sew. Mach. Co.*, 26 Ohio St. 562; *Brady v. Palmer*, 19 Ohio Cir. Ct. 687; *Toledo Commercial Co. v. Glen Mfg. Co.*, 11 Ohio Cir. Ct. 153, aff'd 55 Ohio St. 217, 45 N. E. 197.

Oklahoma. *St. Paul Fire & Marine Ins. Co. of St. Paul, Minnesota v. Earl*, 54 Okla. 305, 153 Pac. 867; *Keokuk Falls Improvement Co. v. Kingsland & Douglas Mfg. Co.*, 5 Okla. 32, 47 Pac. 484. See *Kibby v. Cubie, Heimann & Co.*, 41 Okla. 116, 137 Pac. 352.

Pennsylvania. *Blue Valley Creamery Co. v. Zimmerman*, 60 Pa. Super. Ct. 278; *Keystone Wrapping Mach. Co. v. Bromeyer*, 42 Pa. Super. Ct. 384; *Arms Pocket-Book & Leather Novelty Co. v. Posey*, 40 Pa. Super. Ct. 361.

South Dakota. *Kelley v. R. J. Schwab & Sons*, 22 S. D. 406, 118 N. W. 696; *Acme Mercantile Agency v. Rochford*, 10 S. D. 203, 66 Am. St. Rep. 714, 72 N. W. 466; *Bradley, Metcalf & Co. v. Armstrong*, 9 S. D. 267, 68 N. W. 733.

Virginia. *Worrell & Williams v. Kinnear Mfg. Co.*, 103 Va. 719, 2 Ann. Cas. 997, 49 S. E. 988; *Nickels v. People's Building, Loan & Savings Ass'n*, 93 Va. 380, 25 S. E. 8.

In an action by a foreign corporation on a promissory note made and payable in the state, it will be presumed that the plaintiff has complied with a statute of the state prescribing the conditions on which foreign corporations may do business in the state, where the failure to comply does not appear on the face of the petition, and the petition need not allege compliance. Failure to comply must be taken advantage of by answer. *Acme*

Mercantile Agency v. Rochford, 10 S. D. 203, 66 Am. St. Rep. 714, 72 N. W. 466, citing *Cassaday v. American Ins. Co.*, 72 Ind. 95.

"If plaintiff is barred from maintaining this action because of the statutory provision, that fact has no bearing upon the jurisdiction of the court, but may be pleaded by defendants as an affirmative defense in bar of the action. *Power Specialty Co. v. Michigan Power Co.*, 190 Mich. 699, 157 N. W. 408. * * * Averment in the bill that plaintiff has complied with the statute is unnecessary, as such compliance will be presumed. *Prussian National Insurance Co. v. Eisenhardt*, 153 Mich. 198, 116 N. W. 1097. We are quite clear that the defense relied upon is affirmative in character, and must be pleaded in bar." *Lewis J. Selznick Enterprises, Inc. v. Harry I. Garson Productions*, — Mich. —, 167 N. W. 1010.

⁴⁹ **Dakota.** *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743.

Delaware. *Model Heating Co. v. Magarity*, 25 Del. 459, L. R. A. 1915 B 665, 81 Atl. 394; *Standard Sew. Mach. Co. v. Frame*, 2 Pennw. 430, 48 Atl. 188.

Florida. *Farrell v. Forest Inv. Co.*, 74 So. 216; *Holder Turpentine Co. v. M. C. Kiser Co.*, 68 Fla. 312, 67 So. 85.

Illinois. *Leman v. United States Fidelity & Guaranty Co.*, 137 Ill. App. 258; *F. H. Earl Mfg. Co. v. Summit Lumber Co.*, 125 Ill. App. 391; *Peoria Star Co. v. Steve W. Floyd Special Agency Co.*, 115 Ill. App. 401.

Indiana. *C. Callahan Co. v. Wall Rice Milling Co.*, 44 Ind. App. 372, 89 N. E. 418; *Pittsburgh, C. & St. L. R. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995; *North Mercer Natural Gas Co. v. Smith*, 27 Ind. App. 472, 61 N. E. 10.

Kansas. *Standard Stock Food Co.*

Facts sufficient to bring the corporate act within the pur-

v. Jasper, 76 Kan. 926, 92 Pac. 1094; Leonard v. American Steel & Wire Co., 73 Kan. 79, 9 Ann. Cas. 491, 84 Pac. 553; Vickers v. Buck Stove & Range Co., 70 Kan. 584, 79 Pac. 160. See, however, Colean Mfg. Co. v. Johnson, 82 Kan. 655, 20 Ann. Cas. 296, 109 Pac., 403, holding that noncompliance with the statutory conditions may be shown under general denial in an action of replevin.

Massachusetts. Friedenwald Co. v. Warren, 195 Mass. 432, 81 N. E. 207. See also National Fertilizer Co. v. Fall River Five Cents Sav. Bank, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510, 82 N. E. 671.

Missouri. Tribble v. Halbert, 143 Mo. App. 524, 127 S. W. 618.

Pennsylvania. Arms Pocket-Book & Leather Novelty Co. v. Posey, 40 Pa. Super. Ct. 361.

South Dakota. Kelley v. R. J. Schwab & Sons, 22 S. D. 406, 118 N. W. 696; Iowa Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449.

If the want of capacity on the part of the foreign corporation to sue does not appear on the face of the complaint it must be specially pleaded, or it is waived. Leonard v. American Steel & Wire Co., 73 Kan. 79, 9 Ann. Cas. 491, 84 Pac. 553; Jordon v. Western U. Tel. Co., 69 Kan. 140, 76 Pac. 396.

Under a statute providing that no foreign corporation doing business in the state without a certificate that it has complied with the laws of the state and may lawfully do business therein shall maintain any action in the courts of the state upon any contract made by it in the state until it shall have procured such certificate, it was held that the failure of the complainant to comply with the laws of the state was an affirmative defense and must be specially pleaded. Charles

Roome Parmele Co. v. Haas, 171 N. Y. 579, 64 N. E. 440; F. J. Emmerich Co. v. Sloane, 108 N. Y. App. Div. 330, 95 N. Y. Supp. 39, 1129, aff'g 46 N. Y. Misc. 513, 95 N. Y. Supp. 39; International Society v. Dennis, 76 N. Y. App. Div. 327, 78 N. Y. Supp. 497; W. P. Fuller Co. v. Schrenk, 58 N. Y. App. Div. 222, 68 N. Y. Supp. 781, aff'd 171 N. Y. 671, 64 N. E. 1126; St. George Vineyard Co. v. Fritz, 48 N. Y. App. Div. 233, 62 N. Y. Supp. 775; Lukens Iron & Steel Co. v. Payne, 13 N. Y. App. Div. 11, 43 N. Y. Supp. 376; Lehigh & N. E. R. Co. v. American Bonding & Trust Co., 40 N. Y. Misc. 698, 83 N. Y. Supp. 191; O'Reilly, Skelly & Fogarty Co. v. Greene, 18 N. Y. Misc. 423, 41 N. Y. Supp. 1056, aff'g 17 N. Y. Misc. 302, 40 N. Y. Supp. 360. See, however, Bouker Contracting Co. v. Del Genovese, 33 N. Y. Supp. 10.

The failure of a foreign corporation to comply with the laws of Oklahoma before doing business therein is defensive matter that should be pleaded in the answer as other defenses, and the filing of a demurrer or other plea does not preclude the setting up of such defense. Bailey v. Parry Mfg. Co., — Okla. —, 158 Pac. 581.

It was held in Kansas that where the statute provides that no action shall be maintained or recovery had in any of the courts of the state by a foreign corporation doing business in the state without first obtaining a certificate of compliance, it is error for the trial court to refuse to hear evidence by the defendant in support of a motion to dismiss the suit on the ground that the plaintiff is a foreign corporation doing business in the state without complying with the provisions of the statute, and to overrule said motion. Vickers v. Buck Stove & Range Co., 70 Kan. 584, 79 Pac. 160.

view of the statute must be stated in the defendant's pleadings.⁵⁰ Thus where a statute makes void a contract made in the

⁵⁰ **United States.** Tacony Iron Co. v. Sloss-Sheffield Steel & Iron Co., 183 Fed. 896, aff'g 183 Fed. 645.

Dakota. Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

Florida. Holder Turpentine Co. v. M. C. Kiser Co., 68 Fla. 312, 67 So. 85.

Illinois. Leman v. United States Fidelity & Guaranty Co., 137 Ill. App. 258.

Indiana. Finch v. Travellers' Ins. Co., 87 Ind. 302; Singer Mfg. Co. v. Effinger, 79 Ind. 264; Singer Mfg. Co. v. Brown, 64 Ind. 548; C. Callahan Co. v. Wall Rice Milling Co., 44 Ind. App. 372, 89 N. E. 418; Pittsburgh, C., C. & St. L. R. Co. v. German Ins. Co., 44 Ind. App. 268, 87 N. E. 995.

Kansas. Standard Stock Food Co. v. Jasper, 76 Kan. 926, 92 Pac. 1094. See Life Ass'n of America v. Cook, 20 Kan. 19.

Ohio. Toledo Commercial Co. v. Glen Mfg. Co., 11 Ohio Cir. Ct. 153, aff'd 55 Ohio St. 217, 45 N. E. 197.

Pennsylvania. Arms Pocket-Book & Leather Novelty Co., 40 Pa. Super. Ct. 361.

South Dakota. Kelley v. R. J. Schwab & Sons, 22 S. D. 406, 118 N. W. 696.

It is held that a mere allegation in the pleading of the defendant that the foreign corporation has failed to comply with the laws of the state, imposing conditions upon foreign corporations is insufficient for the reason that it fails to specify the particulars of noncompliance. *Mobile Cotton Mills v. Smyrna Shirt & Hosiery Co.*, 5 Pennew. (Del.) 518, 62 Atl. 146; *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719, 2 Ann. Cas. 997, 49 S. E. 988; *National Mut. Building & Loan Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521.

For a plea held to be sufficient, see *Cæsar v. Capell*, 83 Fed. 403.

A plea to raise the question that a foreign corporation had not complied with a statute providing that no action can be maintained by a foreign corporation doing business in the state upon any demand arising out of contract or tort unless such corporation shall have complied with the statute at the time it entered into the contract in suit, should set up such fact specifically and affirmatively aver that the corporation in question did "do business" in the state. *Peoria Star Co. v. Steve W. Floyd Agency*, 115 Ill. App. 401; *Mutual Mfg. Co. v. Alpaugh*, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; *C. Callahan Co. v. Wall Rice Milling Co.*, 44 Ind. App. 372, 89 N. E. 418; *Pittsburgh, C., C. & St. L. Ry. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995. See also *Blue Valley Creamery Co. v. Zimmerman*, 60 Pa. Super. Ct. 278.

In an action of assumpsit by a foreign corporation, an affidavit of defense averring that the plaintiff is a foreign corporation and that the defendant is informed by letter from the office of the secretary of state, and therefore avers, that it has not filed a statement in the office of the secretary and complied with the provisions of a certain act, the title of which is set forth, and that the defendant is advised and avers that the plaintiff consequently cannot maintain an action in the state, was held insufficient in that it did not aver that the plaintiff was doing business in the state. *Campbell Printing Press & Manufacturing Co. v. Hering*, 139 Pa. St. 473.

See also for requisites of affidavit of defense, *Arms Pocket-Book & Leather Novelty Co. v. Posey*, 40 Pa. Super. Ct. 361; *Galena Mining & Smelting Co.*, 20 Pa. Super. Ct. 394.

Where a statute prescribing condi-

state by a foreign corporation before complying with the provisions of the statute, the answer must set forth that the contract was made in the state.⁵¹ In an action by a foreign corporation on sundry accepted drafts, a plea in abatement alleging that the complainant was a foreign corporation and had an office and domicile in the state, and was carrying on business in the state at the time the cause of action accrued and had not registered its charter in the state, prior to the time when the cause of action accrued to the plaintiff, as required by the statute regulating the right of foreign corporations to do business in the state, and that therefore the plaintiff had no legal existence for the purpose of maintaining the suit, was held insufficient in that it did not allege that the drafts or cause of action sued on arose out of the business transactions conducted at the office or agency in the state.⁵² Furthermore, there must be a precise averment of sufficient

tions precedent to the right of foreign corporations to do business in the state provides that a foreign corporation having capital stock divided into shares shall file its certificate or articles of incorporation and pay to the secretary of state certain fees, as a condition precedent to the exercise of any corporate power or the doing of any business in the state, a plea of a defendant alleging that the plaintiff is a foreign corporation and that it has not made the necessary filings or paid the fees required by the law of foreign corporations is insufficient in failing to allege that plaintiff is a foreign corporation having capital stock divided into shares, thus bringing it within the class of corporations designated in the statute, and a demurrer to such plea is properly sustained. *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119, 63 Pac. 410.

Where the answer alleges as a defense that the complainant foreign corporation was a corporation organized under the laws of a certain state and had not complied with a statute of the state in which the suit was brought imposing conditions upon foreign corporations doing business therein, and the replication to the answer

alleges that the plaintiff was incorporated beyond the limits of the state in which the action was brought and clearly identifies the corporation as the same corporation described in the answer, and the evidence showed that the corporation was created under the laws of a state other than that mentioned in the answer, it was held that the variance between the allegation and the proof was immaterial, as the consequence of noncompliance attached regardless of the particular state by which the corporation was created, though proper practice required that the defendant in the court below should have asked leave in the trial to amend his answer when the objection on account of the variance between the allegation and the answer was made. *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740.

⁵¹ *Mutual Mfg. Co. v. Alsbaugh*, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; *Finch v. Travellers' Ins. Co.*, 87 Ind. 302.

⁵² *Jung Brewing Co. v. Levisy* (Tenn. Ch. App.), 37 S. W. 889. The court said: "All the defendant averred might be true, and, for the purposes of this hearing, must be assumed to be true, yet the complainant

facts to bring the case within the prohibition of the statute, and it cannot be based on inference.⁵³ And the plea or answer must state not conclusions, but facts showing such noncompliance by the foreign corporation when doing business in the state without compliance with a statute imposing conditions upon foreign corporations doing business in the state.⁵⁴ Thus it is not sufficient merely to aver that "plain-

would have the right to maintain the bill notwithstanding. The plea avers that the complainant was a foreign corporation, and had an office or agency and was carrying on business in the state when the cause of action sued on accrued, but does not aver that the drafts or cause of action sued on arose out of that office or agency, or in connection with the business carried on in Tennessee, at such office or agency. It is quite possible that these drafts may not have been connected with the Tennessee office or agency. As to how the fact was the defendant should have averred, if he chose to place his defense upon a plea raising the question of the complainant's inability to sue. The fact that a corporation is a foreign one does not preclude it from selling goods in the state, and collecting the price. It would be protected in such transaction, as interstate commerce. Where, not having registered its charter, it has an office or agency in the state, and is doing business in the state, and the cause of action arises in connection with such office or agency, the contract thence arising is void, as being a violation of Acts 1891, c. 122. Such was the case of *Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743. And see *Manufacturing Co. v. Gorten*, 93 Tenn. 590, 597, 27 S. W. 971, 973. But the fact that a foreign corporation has an office or agency within the state, and is carrying on a business in connection therewith, does not prevent its conducting other transactions of a similar kind, independent of such office or agency. Such other transac-

tions would be independent of the office or agency, as local business, and be protected as interstate commerce. In the case we have on hand we are confined to the narrow bounds of a plea. The complainant, suing on accepted drafts, presents a prima facie case of recovery. If the defendant wishes to meet the complainant's case by a plea that inferentially admits the prima facie case, and seeks to avoid it on independent grounds, such grounds must be sufficient to meet the whole case. We do not think such grounds are stated in the plea in this case."

⁵³ *United States. Tacony Iron Co. v. Sloss-Sheffield Steel & Iron Co.*, 188 Fed. 896, aff'g 183 Fed. 645; *Scott v. Stockholders' Oil Co.*, 129 Fed. 615; *Caesar v. Capell*, 83 Fed. 103.

Dakota. Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

District of Columbia. Stone v. Chesapeake & C. Inv. Co., 15 App. Cas. 585.

New Jersey. Alleghany Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724, dismissed 196 U. S. 458, 49 L. Ed. 551.

Ohio. Brady v. Palmer, 19 Ohio Cir. Ct. 687.

⁵⁴ *United States. Tacony Iron Co. v. Sloss-Sheffield Steel & Iron Co.*, 188 Fed. 896, aff'g 183 Fed. 645.

Colorado. American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 Pac. 410.

Dakota. Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743.

Indiana. Mutual Mfg. Co. v. Alpaugh, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; *Singer Mfg. Co. v. Effinger*, 79 Ind. 264; *Black v. Enter-*

tiff had not complied with the provisions of." a particular statute.⁵⁵

In some jurisdictions the defense that a foreign corporation has not complied with the conditions prescribed by the statute as precedent to its right to do business in the state, and hence is without capacity to sue, must be set up by a plea in abatement, and is waived by a plea of general issue.⁵⁶

prise Ins. Co., 33 Ind. 223; C. Callahan & Co. v. Wall Rice Milling Co., 44 Ind. App. 372, 89 N. E. 418; Pittsburgh, C., C. & St. L. R. Co. v. German Ins. Co., 44 Ind. App. 268, 87 N. E. 995.

New York. Myers v. Machado, 6 Abb. Pr. 198, 14 How. Pr. 149, 13 N. Y. Super. Ct. 678.

Virginia. Worrell v. Kinnear Mfg. Co., 103 Va. 719, 2 Ann. Cas. 997, 49 S. E. 988.

⁵⁵ Singer Mfg. Co. v. Effinger, 79 Ind. 264. See also Gull River Lumber Co. v. Keefe, 6 Dak. 160, 41 N. W. 743. See, however, F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391, holding that a plea alleging that a foreign corporation plaintiff was doing business in the state contrary to the statute imposing conditions upon its right to do so, is sufficient if framed in the language of the statute, and it need not describe in detail what business such a corporation was doing.

A denial of compliance by the foreign corporation with the laws of the state made on information and belief is sufficient. Bismarek Mountain Gold Min. Co. v. North Sunbeam Gold Co., 14 Idaho 516, 95 Pac. 14.

It was held in Tennessee that a bill attacking the validity of certain trust deeds executed to a foreign corporation on the ground that it had not complied with the provisions of a certain statute sufficiently alleged such noncompliance when it charged that at the date of the execution of the trust deeds the defendant corporation was a foreign corporation doing business in a certain county in the state, with-

out having complied with a certain statute. Such averment was substantially in the language of the statute. Myers Mfg. Co. v. Wetzel (Tenn. Ch. App.), 35 S. W. 896.

⁵⁶ Weaver Coal & Coke Co. v. Rhode Island Co-operative Coal Co., 27 R. I. 194, 61 Atl. 426, holding that after the defendant filed its plea of general issue, it could not move to dismiss the case on the ground of such noncompliance by the plaintiff.

See also Wetzel & T. Ry. Co. v. Tennis Bros. Shoe Co., 145 Fed. 458, 7 Ann. Cas. 426, aff'g 140 Fed. 193; Phenix Bank v. Curtis, 14 Conn. 437, 36 Am. Dec. 492; Stone v. Chesapeake & C. Inv. Co., 15 App. Cas. (D. C.) 585; Singer Mfg. Co. v. Brown, 64 Ind. 548; Daly v. National Life Ins. Co. of United States of America, 64 Ind. 1; C. Callahan Co. v. Wall Rice Milling Co., 44 Ind. App. 372, 89 N. E. 418; Brady v. Palmer, 10 Ohio Cir. Dec. 27, 190 Ohio Cir. Ct. 687; Kibby v. Cubie, Heimann & Co., 41 Okla. 116, 137 Pac. 352.

Under a statute which does not render void contracts made by a foreign corporation doing business in the state without compliance with its requirements, but, if the failure is properly presented to the court, merely suspends the remedy of the corporation until the statutory requirements are complied with, it was held in Indiana that to render evidence of such failure available in a case where it may have any effect, it must be shown by plea in abatement, and therefore under oath in an answer which must precede, and cannot be pleaded with, an

The general rule is that if the want of capacity to sue appears upon the face of the complaint or other similar pleading, a demurrer will lie.⁵⁷ When the record discloses affirmatively that the plaintiff, a

answer in bar, and the issue thereon must be tried first and separately. *North Mercer Natural Gas Co. v. Smith*, 27 Ind. App. 472, 61 N. E. 10. See also *Mutual Mfg. Co. v. Alpaugh*, 174 Ind. 381, 92 N. E. 113, 91 N. E. 504; *C. Callahan Co. v. Wall Rice Milling Co.*, 44 Ind. App. 372, 89 N. E. 418; *Pittsburgh, C. & St. L. R. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995.

Under L. O. L. § 6709, providing that a plea that any foreign corporation has not paid any tax or fee required by any law of the state, and which is then due and payable, may be interposed at any time before trial upon the merits in any action, and if issue be joined upon such plea the same shall be first tried, it is held that the objection must be raised by a plea in abatement. *Hirschfeld v. McCullagh*, 64 Ore. 502, 130 Pac. 1131, aff'g 127 Pac. 541. See also *Big Basin Lumber Co. v. Crater Lake Co.*, 63 Ore. 359, 127 Pac. 982.

Where the statute imposing conditions upon the right of foreign corporations to do business in the state does not prohibit the maintenance of actions by the foreign corporation, but merely suspends the right of action until compliance by the corporation with the statutory conditions, the failure of the corporation to comply with such conditions must be seasonably and properly presented by a plea in abatement. *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 196 Mass. 458, 14 L. R. A. (N. S.) 561, 13 Ann. Cas. 510, 93 N. E. 671; *Friedenwald Co. v. Warren*, 195 Mass. 432, 81 N. E. 207.

Under a statute providing that foreign corporations which have not complied with the conditions precedent to

their right to do business in the state shall not be entitled to maintain any action in the courts of the state and that a failure of a foreign corporation plaintiff in such respect may be pleaded in abatement in any action, suit or proceeding, such failure has been held by a federal court not to affect its jurisdiction in a pending suit, the failure in such respect being a matter which the defendant is at liberty either to raise or reject. *Wetzel & T. Ry. Co. v. Tennis Bros. Co.*, 145 Fed. 458, 7 Ann. Cas. 426, aff'g 140 Fed. 193.

"It is true * * * that a state may exclude foreign corporations entirely, or may prevent them doing any business whatever in the state, until they have fulfilled all the requirements imposed by the legislature; but we find, from an examination of the cases in other states, in which statutes more or less similar to our own were involved, that advantage of the plaintiff's failure to comply with the laws of the state giving authority to do business must be taken either by plea in abatement, other special plea, or by answer." *Standard Sew-Mach. Co. v. Frame*, 2 Pennw. (Del.) 430, 48 Atl. 188.

⁵⁷ *Illinois. Tennessee Packing & Provision Co. v. Fitzgerald*, 140 Ill. App. 430.

Indiana. *Walter A. Wood Mowing & Reaping Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641.

Kansas. *Leonard v. American Steel & Wire Co.*, 73 Kan. 79, 9 Ann. Cas. 491, 84 Pac. 553.

Missouri. *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.*, 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31.

Nebraska. *Northern Assur. Co. v.*

foreign corporation, has been doing business in the state, without complying with the conditions prescribed by the statutes, and such failure to comply is a bar to the maintenance of the action, a demurrer to the petition is properly sustained.⁵⁸ This is true even though it was unnecessary for the plaintiff corporation to allege in its complaint that it had complied with the statutory requirements imposed upon its right to do business in the state.⁵⁹ Where the bill does not show a doing of business in the state by the complainant, such as to require it to file a statement designating a known place of business and an authorized agent within the state, a demurrer to the bill on the ground that it does not show a compliance with the statute by the plaintiff is without merit.⁶⁰ Under a statute which has no application to a foreign corporation which has not transacted business in the state and does not intend to, nor to a foreign corporation which is simply attempting to collect in the courts the obligations of a citizen of the state, it is held that a complaint which simply alleges that the plaintiff is a corporation organized and created under the laws of a certain other state, but which does not show that the complainant was ever

Borgelt, 67 Neb. 282, 93 N. W. 226.

New York. Charles Roome Parmele Co. v. Haas, 171 N. Y. 579, 64 N. E. 440, rev'g 67 App. Div. 457, 73 N. Y. Supp. 986; Carter v. Herbert Booth King & Bro. Pub. Co., 26 Misc. 652, 56 N. Y. Supp. 382; O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423, 41 N. Y. Supp. 1056; Clegg v. Cramer, 3 How. Pr. (N. S.) 128; American Mfg. Co. v. Weintraub, 115 N. Y. Supp. 88.

⁵⁸ Tennessee Packing & Provision Co. v. Fitzgerald, 140 Ill. App. 430; Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31; Northern Assur. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226; Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

Thus where the petition alleged that the plaintiff had made the contracts in another state, to be governed by the laws of that state, insuring property in the state where the action was brought, and copies of the policies

were filed and made a part of the record, and from the petition and instruments filed it appeared affirmatively that the transactions involved were in violation of the statutes of the latter state, it was held that a demurrer by the defendant was properly sustained. Northern Assur. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226; Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922.

⁵⁹ Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 23 L. R. A. (N. S.) 492, 120 S. W. 31. See Consolidated Wagon & Machine Co. v. Kent, 23 Idaho 690, 132 Pac. 305; Woodward Lumber Co. v. General Supply & Construction Co., 60 N. Y. Misc. 367, 113 N. Y. Supp. 628.

⁶⁰ American Building Loan & Tontine Sav. Ass'n v. Haley, 132 Ala. 135, 31 So. 88; Henderson v. J. B. Brown Co., 125 Ala. 566, 28 So. 79; Aultman & Taylor Co. v. Mead, 109 Ky. 583, 60 S. W. 294.

engaged in business in the state, or that the alleged cause of action grew out of any business transacted in the state where the action is brought, is not demurrable on account of its failure to allege that the corporation has complied with the provisions of such statute.⁶¹ Where the complaint shows only that the foreign corporation plaintiff sent a promissory note to the defendant bank for collection with instructions to return the same if not paid by a certain time and that the defendant failed and neglected so to do, a demurrer on the ground that the plaintiff is an unlicensed foreign corporation doing business in the state is not well taken.⁶² Where it appears from the record that the plaintiff foreign corporation is carrying on interstate commerce and that the order for the goods which is the basis of the suit was addressed to it at its place of business in the state of its creation, a denial in the answer of the defendant that the plaintiff was entitled to do business in the state raises no issue.⁶³ Where the complaint in an action by a foreign corporation alleges that it has complied with the constitutional and statutory conditions prerequisite to its right to do business in the state, a denial of such compliance made upon information and belief is held to be not sufficient.⁶⁴

§ 5999. Raising noncompliance with statute in court of review.

Where a bill by a foreign corporation to foreclose a mortgage disclosed that the complainant was a foreign corporation and that the transaction involved, the loan of money secured by notes and mort-

⁶¹ *National Life & Trust Co. v. Gifford*, 90 Minn. 358, 96 N. W. 919.

"A foreign corporation doing business in this state will be presumed to have complied with the statutes prescribing conditions upon which such corporations may do business within our borders, and the burden is upon the defendant, where the failure of the corporation to comply with the statute is relied upon as a defense, such failure not appearing on the face of the complaint, to affirmatively plead the same in his answer." *Lehigh Valley Coal Co. v. Gilmore*, 93 Minn. 432, 106 Am. St. Rep. 443, 2 Ann. Cas. 1004, 101 N. W. 796.

In an action by a foreign corporation to recover on notes given for machinery sold by it, and to enforce

a mortgage lien securing such notes, it was held that a special demurrer based upon an affidavit that the plaintiff was a foreign corporation and had failed to comply with the statute requiring it to file with the secretary of state a statement designating its place of business and the name of its agent upon whom process might be executed, was properly overruled. *Aultman & Taylor Co. v. Mead*, 109 Ky. 583, 60 S. W. 294.

⁶² *W. H. Kiblinger Co. v. Sauk Bank*, 131 Wis. 595, 111 N. W. 709.

⁶³ *Toledo Computing Scale Co. v. Young*, 16 Idaho 187, 101 Pac. 257.

⁶⁴ *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 Pac. 14.

gage, was the doing of business in the state within the meaning of its constitutional and statutory provisions requiring foreign corporations to have a known place of business and an authorized agent thereat in the state before doing any business therein, but contained no averment that the complainant had at the time of the transaction a known place of business in the state and an agent thereat, or that it had ever complied with the law in this respect, it was held that while the absence of such averment would have been a fatal defect on demurrer, yet, when it was in no way raised in the trial court, it could not be raised for the first time on appeal.⁶⁵

It is held in Texas that the objection that a foreign corporation plaintiff has not secured a permit to do business in the state as required by a statute providing that no foreign corporation doing business in the state can maintain any action on any contract or in tort unless at the time such contract was made or tort committed it had secured such permit, cannot be made on appeal where the petition of the plaintiff does not show affirmatively that it was doing business in the state without having secured such permit and the plaintiff might have been able to make out its case without alleging and establishing compliance by it with such statutory requirement.⁶⁶

§ 6000. Presumption as to place of contract or doing business by foreign corporation. In an action by a foreign corporation as assignee or indorsee of a promissory note, where the record does not show the place of indorsement, the court will presume that the note was transferred at the banking house of the corporation outside of the state.⁶⁷ And where the complaint in an action against a foreign cor-

⁶⁵ *Ginn v. New England Mortgage Security Co.*, 92 Ala. 135, 8 So. 388. See *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347.

See § 5976, *supra*.

⁶⁶ *Pratt v. Interstate Savings & Trust Co.*, 63 Tex. Civ. App. 358, 133 S. W. 921. Compare, however, *Mansur & Tebbetts Implement Co. v. Beer*, 19 Tex. Civ. App. 311, 45 S. W. 972, in which case it was held that under the Texas statute requiring every foreign corporation desiring to transact business in the state to file with the secretary of state a copy of its charter and procure from him a permit and

providing that no foreign corporation shall maintain any suit in any court of the state upon any demand, whether arising out of contract or tort, unless, at the time such contract was made, or tort committed, the corporation had so filed its charter for the purpose of securing the permit, the foreign corporation must plead and prove that it has complied with such statute, and if the fact of compliance is not alleged and proven by the complainant in the court below, it may be raised for the first time in a court of review.

⁶⁷ *Bank of Washtenaw v. Montgomery*, 3 Ill. 422. See §§ 5997, 5998, *supra*.

poration to recover for the price of an article sold by it alleges that the plaintiff is a foreign corporation, it will be presumed that it is transacting business in the state by which it was created.⁶⁸

§ 6001. Necessity of pleading corporate existence. The necessity for pleading the formation and existence of the corporation plaintiff is treated elsewhere in this work, and the same rules applicable to domestic corporations apply to foreign corporations, in the absence of a statute specifically regulating the question.⁶⁹ The general rule in the majority of states is that it is not necessary for the plaintiff to allege that it is a corporation or to plead the act of incorporation.⁷⁰

⁶⁸ *Angldile Computing Scale Co. v. Gladstone*, 164 N. Y. App. Div. 370, 149 N. Y. Supp. 807.

⁶⁹ For mode and sufficiency of pleading corporate existence, see § 3043, *supra*.

In an action by a foreign corporation it is not necessary for the plaintiff to allege that it is a corporation in the pleading, but it is sufficient to state in the commencement of the declaration the name of the corporation, in the same manner as the name of a natural person suing is stated. *Union Cement Co. v. Noble*, 15 Fed. 502.

⁷⁰ See §§ 437, 3042, 3043, 3072, 3073, 3083, *supra*. See also:

United States. *Union Cement Co. v. Noble*, 15 Fed. 502.

Illinois. *Washtenaw Bank v. Montgomery*, 3 Ill. 422.

Missouri. *Northwestern Stove Repair Co. v. Cornwall*, 148 Mo. App. 605, 128 S. W. 535; *Brunswick-Balke-Clender Co. v. Kraus*, 132 Mo. App. 323, 112 S. W. 20.

New Jersey. *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528.

New York. *Waterville Mfg. Co. v. Bryan*, 14 Barb. 182; *Marine & Fire Ins. Bank v. Jauncey*, 1 Barb. 486; *Holyoke Bank v. Haskins*, 6 N. Y. Super. Ct. 675; *Bank of Michigan v. Williams*, 5 Wend. 478, *aff'd* 7 Wend.

539. See *Kaulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286.

Ohio. *Elektron Mfg. Co. v. Jones Bros. Elec. Co.*, 8 Ohio Cir. Ct. 311, 4 Ohio Cir. Dec. 555, *aff'd* 54 Ohio St. 659, 46 N. E. 1160.

In holding that it is not necessary for a foreign corporation to aver that it is a corporation, in a New Jersey case the court said: "If we admit the principle which is proved by the numerous authorities cited in the argument, that a foreign corporation may maintain an action in our courts, and that it is not necessary that their charter should be set forth in their declaration, it remains to inquire whether they are by law required to aver that they are a legally incorporated company. No adjudged case has been referred to, nor have I been able to find one in which this had been required. It is true, many cases have been cited where such averment was made, but I am not aware of a single case in which the question was raised, and there are very many cases in the books, as well as in the records of our own courts, of declarations without such averment. Nor can I find any such distinction as is drawn by counsel for defendant, between corporations, whose name denotes their corporate character, and where it does not, nor do I think such distinction

In some cases it is said that it is unnecessary to allege corporate existence where the name denotes the corporate character of the plaintiff.⁷¹ In those jurisdictions where it is necessary to allege the corporate existence of the foreign corporation plaintiff, it is held that it is only necessary to aver that the plaintiff is a corporation organized and existing under the laws of a certain state.⁷² The accepted and formal allegation in a declaration, complaint or bill by the corporation is that plaintiff was, at the times in question, a corporation duly created by and duly organized and existing under and by virtue of the laws of the state naming it.⁷³ The necessity, mode and sufficiency of averring corporate existence in actions brought in the federal courts have been considered elsewhere.⁷⁴

A foreign incorporation should be pleaded in the same manner as

is founded either in the law or reason of the thing. * * * A rational construction is to be given to pleading where it is susceptible of it; and we are not to resort to any other when it is equally natural and more consistent with the intent and object which the party has in view." *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528.

A petitioning foreign corporation creditor in involuntary insolvency proceedings need not allege and exhibit proof of corporate existence or make proof of its charter, as this is a matter for proof. *Whyte v. Betts Mach. Co.*, 61 Md. 172.

⁷¹ See §§ 3042-3043, *supra*.

⁷² See *Eslava v. Ames Plow Co.*, 47 Ala. 384; *Gorton Steamer Co. v. Spofford*, 5 Civ. Proc. (N. Y.) 116; *Columbia Bank v. Jackson*, 24 N. Y. St. Rep. 738, 4 N. Y. Supp. 433; *Smith v. Weed Sew. Mach. Co.*, 26 Ohio St. 562. See, however, *Devoss v. Gray*, 22 Ohio St. 159, holding that the act must be specially pleaded.

See § 3043, *supra*.

For cases holding that existence of foreign corporation should be pleaded, see *Southern Life Ins. Co. v. Roberts*, 60 Ala. 431; *Connecticut Bank v. Smith*, 9 Abb. Pr. (N. Y.) 168, 17 How. Pr.

487; *Bank of Alabama v. Simonton*, 2 Tex. 531.

It has been held that the absence of an allegation of the plaintiff's corporate capacity in an original complaint filed by a foreign corporation could not be regarded as a failure to name any plaintiff at all, and that an amendment of the complaint by stating the plaintiff's corporate character should be allowed. *Rosenberg v. H. B. Chaffin Co.*, 95 Ala. 249, 10 So. 521; *Southern Life Ins. Co. v. Roberts*, 60 Ala. 431.

Where the declaration in an action of assumpsit alleged that the plaintiff was a corporation organized under the laws of a certain state, it was held that this was a traversable averment of a fact which could only be reached by a proper plea, and the failure to file with the declaration the articles of incorporation would be merely evidence to establish the fact that the plaintiff was so incorporated, and would not be a part of the declaration, even if they had been filed with it. *C. J. L. Meyer & Sons Co. v. Black*, 4 N. M. 190, 16 Pac. 620.

⁷³ See § 3043, *supra*, where the mode and sufficiency of averring corporate existence are fully treated.

⁷⁴ See § 3050, *supra*.

a domestic one, with the additional allegation of the name of the state by which it was created and this may be stated in general terms in complaints either by or against the corporation.⁷⁵ It need not be alleged whether the corporation is domestic or foreign, unless such particulars are required by statute or are involved in pleading some fact essential in or prerequisite to the action.⁷⁶ Where a foreign corporation in its petition in replevin based on a chattel mortgage under which it claimed title to the property sought to be recovered, alleged that it was a corporation created by the laws of one state and the chattel mortgage showed that it was a corporation created by the laws of another state, the place of incorporation was regarded as surplusage, and the variance held to be immaterial.⁷⁷ Where the complaint avers and the answer admits that plaintiff's foreign corpora-

⁷⁵ *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283; *Gorton Steamer Co. v. Spofford*, 5 N. Y. Civ. Proc. 116; *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532; *Taylor's Adm'r v. Bank of Alexandria*, 5 Leigh (Va.) 471.

A foreign corporation need not plead its organic statute to support the introduction of such law in evidence. *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

Allegation that it is under "laws of Pennsylvania" will admit proof of such laws. *Gorton Steamer Co. v. Spofford*, 5 N. Y. Civ. Proc. 116. And see to same effect, *Saunders v. Sioux City Nursery Co.*, 6 Utah 431, 24 Pac. 532.

⁷⁶ See § 3043, supra. See also *Head v. J. M. Robinson, Norton & Co.*, 191 Ala. 352, 67 So. 976; *Jones v. Pacific Dredging Co.*, 9 Idaho 186, 72 Pac. 956; *Imperial Curtain Co. v. Jacob*, 163 Mich. 72, 127 N. W. 772, 17 Det. L. N. 751.

Under N. Y. Code Civ. Proc. § 481, requiring place of trial and names of parties to be specified, the domestic or foreign incorporation of plaintiff and in what state, if foreign, must appear. *Harmon v. Vanderbilt Hotel Co.*, 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783, aff'd 143 N. Y. 665, 39 N. E. 20.

A foreign incorporation must either expressly allege incorporation and the state or comity to which it belongs or declare on a contract made with it whereby defendant admits such facts. *Connecticut Bank v. Smith*, 9 Abb. Pr. (N. Y.) 168, 17 How. Pr. 487.

"In a criminal action it is not necessary to produce the charter of a corporation, but it is sufficient to prove that it carried on business in the name set out in the indictment and was well known by that designation. *State v. Grant*, 104 N. C. 910, 10 S. E. 554. In *Stanly v. Railroad*, 89 N. C. 332, it is held difficult to assign any good reason why a corporation suing or being sued should be designated by any other description than its corporate name, just as with a natural person, the only purpose in either case being to point out the party to the action. Here the note was indorsed to the plaintiff under its alleged corporate name, and the assignment and that the plaintiff was doing business under such corporate name are shown, and there is no evidence to the contrary." *Gulf States Steel Co. v. Ford*, 173 N. C. 195, 91 S. E. 844.

⁷⁷ *Brunswick-Balke-Collender Co. v. Kraus*, 132 Mo. App. 328, 112 S. W. 20.

tion assignor is a corporation existing under the laws of a certain state, such admission is conclusive upon the defendant, and he cannot offer evidence in disproof of such allegation.⁷⁸

§ 6002. Proof of corporate existence—In actions at law. In those jurisdictions where the common-law method of pleading obtains, there is a conflict of authority as to whether pleading the general issue will render it necessary for the foreign corporation plaintiff to prove its corporate existence. In some jurisdictions it is held that when the defendant pleads the general issue, it becomes necessary for the plaintiff to prove its corporate existence.⁷⁹ The weight of authority, however, is to the contrary and holds that pleading the general issue ad-

⁷⁸ *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140.

⁷⁹ *Alabama. Lucas v. Bank of Georgia*, 2 Stew. 147.

New Jersey. Bennington Iron Co. v. Rutherford, 18 N. J. L. 105, 35 Am. Dec. 528; *Washington Life Ins. Co. v. Paterson Silk Mfg. Co.*, 25 N. J. Eq. 160.

New York. Marine & Fire Ins. Bank v. Jauncey, 1 Barb. 486; *Bank v. Stearns*, 15 Wend. 314.

Ohio. Lewis v. Bank of Kentucky, 12 Ohio 132, 40 Am. Dec. 469.

Tennessee. Bank of Jamaica v. Jefferson, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211.

Virginia. Gillett v. American Stove & Hollow Ware Co., 29 Gratt. 565; *Jackson's Adm'x v. Bank of Marietta*, 9 Leigh 240.

West Virginia. Central Land Co. v. Calhoun, 16 W. Va. 361; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

The case of *Henriques v. Dutch West India Co.*, 2 Ld. Raymond 1535 is generally cited by the courts holding that a foreign corporation plaintiff must prove its corporate existence when the general issue is pleaded by the defendant. See *Jackson's Adm'x v. Bank of Marietta*, 9 Leigh (Va.) 240. But this case has been consid-

ered by the Supreme Court of Alabama, which has held in *Lucas v. Bank of Georgia*, 2 Stew. (Ala.) 147, that the case in question did not so hold, saying: "The authorities referred to by the plaintiff rest for support principally on the case of *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1535, but an examination of that case will show that the point was not decided. It was a writ of error from the Common Pleas. Two errors were relied on—that there was no sufficient warrant of attorney to execute a bail bond, upon which judgment had been entered, in the Common Pleas; and that costs were improperly rendered. The court reversed the judgment as to the costs, and affirmed it as to the residue. From this judgment a writ of error was prosecuted to the House of Lords, where, in addition to the errors assigned in the King's Bench, it was insisted that no recognizance in England could be given to the Dutch West India Company; for, that the law of England would not take notice of any foreign corporation; nor could they maintain an action at common law in their corporate name, but must sue, if at all, in the name of the persons comprising the company. To this it was answered, by counsel, that the plaintiffs were estopped by their recog-

mits the corporate existence of the foreign corporation plaintiff and renders it unnecessary for it to prove on the trial its corporate existence.⁸⁰ It is held in the federal courts that by pleading the general

nizance to say there was no such company; and where an action is brought by a corporation, they need not show how they were incorporated. But upon the general issue pleaded by the defendants, the plaintiffs must prove they are a corporation. In a note to the case, the reporter says: 'And upon the trial, Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby, by the law of Holland, they were effectually created a corporation there.' The judgment of the King's Bench was affirmed. It is very certain that the point under discussion did not and could not arise in judgment, either in the King's Bench or House of Lords. And this case is no authority in support of the position that the plaintiffs, under the general issue, must prove their corporate character, unless it can be considered that the statements of counsel, arguendo, or the loose note of the reporter, as to what Lord King told him took place on the trial in the Common Pleas, can be so considered.'

"It is a general rule that a plaintiff need only prove the material allegations of his declaration; therefore, in the absence of an averment of being a corporation, it is not plain why proof should be necessary that the plaintiff is such, unless the defendant challenges the fact affirmatively. But the courts are far from uniform upon the question, and this does not seem to arise from a consideration whether the declaration avers or omits to aver that the plaintiff is a corporation.'" *Union Cement Co. v. Noble*, 15 Fed. 502.

See §§ 3042, 3043, *supra*.

The plea of nonassumpsit put such fact of corporation existence in is-

sue. *Gillett v. American Stove & Hollow Ware Co.*, 29 Gratt. (Va.) 565; *Jackson's Adm'x v. Bank of Marietta*, 9 Leigh (Va.) 240.

⁸⁰ *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. (U. S.) 500, 7 L. Ed. 927; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 450, 7 L. Ed. 212; *Union Cement Co. v. Noble*, 15 Fed. 502; *Phenix Bank v. Curtis*, 14 Conn. 437, 36 Am. Dec. 492; *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 576; *Weaver Coal & Coke Co. v. Rhode Island Co-operative Coal Co.*, 27 R. I. 194, 61 Atl. 426.

See also §§ 352, 3043, 3073, *supra*.

In *Union Cement Co. v. Noble*, 15 Fed. 502, the court said: "It is not necessary for a plaintiff corporation to allege that it is a corporation in the pleading; it is sufficient to state in the commencement of the declaration the name of the corporation, as was done here, just as the name of a natural person suing is stated. 2 Ch. Pl. (16th Ed.) p. 13, form 22, *Woolf v. Steamboat Co.*, 7 C. B. 103; 2 Ld. Raym. 1535; 4 Black 267; 16 Ind. 278; 14 Johns. 245. It is a general rule that a plaintiff need prove only the material allegations of his declaration; therefore, in the absence of an averment of being a corporation, it is not plain why proof should be necessary that the plaintiff is such, unless defendant challenges the fact by plea or notice. But the courts are far from uniform upon the question, and this does not seem to arise from a consideration whether the declaration avers or omits to aver that the plaintiff is a corporation. In several states the courts hold that a corporation instituting suit upon contract, or to recover land, must, upon the trial under the general issue, prove the fact

issue in a suit by a foreign corporation, the defendant admits the capacity of the plaintiff corporation to sue, and evidence is admissible to establish the cause of action without proof of corporate existence by the plaintiff, and, under such plea, evidence to prove that the plaintiff was not a corporation is not admissible; and that, if the defendant wishes to raise the question of want of corporate capacity in the plaintiff to sue, he must insist upon it by a special plea in abatement or bar, or by notice.⁸¹ In those states where the code practice obtains, it is generally held that the question of the corporate existence of the foreign corporation plaintiff is deemed to be admitted, unless it is specially denied by the defendant, and that a general denial is sufficient to raise the question.⁸²

of incorporation. *Ang. & A. Corp.* § 632, note 3. In many other states the courts hold that a plea of the general issue admits or waives proof of the plaintiff's corporate existence. *Ang. & A.* § 633, note 1. There is a collection of cases in the notes referred to in *Angel & Ames*, and also in note g, 1 Ch. Pl. (16th Ed.) 464. Some of the courts hold one rule as to domestic corporations, and another as to foreign corporations. 12 Ohio 132; 8 Vt. 445; 2 N. H. 310; 6 N. H. 198. The Supreme Court of the United States, as early as 1828, in *Conard v. Atlantic Ins. Co.*, 1 Pet. 450, held that by pleading the general issue the defendant necessarily admitted the capacity of the plaintiff corporation to sue, as that is a plea to the merits only. The suit was by a corporation, created under the laws of a state other than Pennsylvania, where it was tried, and was, therefore, a foreign corporation as to Pennsylvania, though in the federal court it would be regarded as a domestic one. In the *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. 500, the same court said: 'The general issue is pleaded, which admits the competency of the plaintiff to sue in the corporate capacity in which they have sued. If the defendant meant to have insisted upon the want of corporate capacity

in the plaintiff to sue, it should have been insisted upon by a special plea in abatement or bar.' The *Society for the Propagation of the Gospel* was organized under the laws of Great Britain. The two cases lead to the conclusion that in the federal courts the rule is the same whether domestic or foreign. Judge Story cites 1 Peters, and other American and English decisions."

⁸¹ *Society for the Propagation of the Gospel v. Pawlet*, 4 Pet. (U. S.) 480, 7 L. Ed. 927; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386, 450, 7 L. Ed. 189; *Union Cement Co. v. Noble*, 15 Fed. 502.

⁸² *Indiana*. *Guaga Iron Co. v. Dawson*, 4 Blackf. 202.

Montana. *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995.

Ohio. *Elektron Mfg. Co. v. Jones Bros. Elec. Co.*, 8 Ohio Cir. Ct. 311.

Oklahoma. *Bledsoe & Son v. Keystone Steel & Wire Co.*, 41 Okla. 586, 139 Pac. 257.

Wisconsin. *Williams Mower & Reaper Co. v. Smith*, 33 Wis. 530.

See, however, *Hummel v. First Nat. Bank of Central City*, 2 Colo. App. 571, 32 Pac. 72; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539.

See also § 3073, *supra*.

Under the code practice it is held

The question of the necessity of pleading and proving the corporate existence of a foreign corporation plaintiff is sometimes regulated by statute.⁸³ Where by statute a plaintiff cannot be required to prove its corporate existence unless the same is denied by a plea verified by affidavit, an unverified plea denying that the plaintiff is a corporation is insufficient and presents no issue as to the existence of the plaintiff as a corporation.⁸⁴ Where the defendant in an action by a foreign corporation interposes the plea of *nul tiel corporation*, it becomes necessary for the plaintiff to prove its corporate existence.⁸⁵ Whether such a plea is a plea in bar or a plea in abatement is a subject of much conflict on the part of the courts. By some of the cases it is

that it is not sufficient for the defendant to deny upon information and belief that the plaintiff is a foreign corporation, and that such a denial does not put the plaintiff to proof of its corporate existence. *McElwee v. Trowbridge*, 68 Hun (N. Y.) 28, 22 N. Y. Supp. 674; *Vulcan v. Myers*, 58 Hun (N. Y.) 161, 11 N. Y. Supp. 663; *Bengston v. Thingvalla Steamship Co.*, 31 Hun (N. Y.) 96, 4 N. Y. Civ. Proc. 260. See, however, *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162; *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995. See also § 3073, *supra*, and § 421, *supra*.

⁸³ See *Becht v. Harris*, 4 Minn. 504; *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 58 Hun (N. Y.) 161, 11 N. Y. Supp. 663; *Clegg v. Chicago Newspaper Union*, 8 Civ. Proc. (N. Y.) 401; *Williams Mower & Reaper Co. v. Smith*, 33 Wis. 530; *Connecticut Mut. Life Ins. Co. v. Cross*, 18 Wis. 109. See also §§ 416, 3042, *supra*.

In New York it is provided by statute that in an action by or against a corporation the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation. N. Y. Code Civ. Proc. § 1776. See also §§ 3042, 3043, *supra*.

Under such a statute, it is held that where the answer merely denies an allegation in the complaint that the defendant was a foreign corporation and does not allege that it was not a corporation as required by the statute, the plaintiff need not prove the existence of the corporation. *Nickerson v. Canton Marble Co.*, 35 N. Y. App. Div. 111, 54 N. Y. Supp. 705. See also *DeMaio v. Standard Oil Co.*, 68 N. Y. App. Div. 167, 74 N. Y. Supp. 165, and § 3043, *supra*.

⁸⁴ *Rosenberg v. H. B. Clafin Co.*, 95 Ala. 249, 10 So. 521. See also § 3073, *supra*.

⁸⁵ *Johnson v. Hanover Nat. Bank*, 88 Ala. 271, 6 So. 909; *Savage v. Russell*, 84 Ala. 103, 4 So. 235; *Gaines v. Bank of Mississippi*, 12 Ark. 769.

A plea denying existence of the statute under which a foreign corporation pleads existence is a plea *nul tiel corporation*. *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202.

See, for requisites of pleas denying corporate existence of plaintiff, *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285; *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202; *Northumberland County Bank v. Eyer*, 60 Pa. St. 436.

For pleading nonexistence or *nul tiel corporation* in actions by corporations, see §§ 3073, 3074, *supra*. See also § 416 *et seq.*, *supra*.

held to be a plea in bar.⁸⁶ In other cases, it is held to be a plea in abatement.⁸⁷ And in other cases it is asserted that it may be pleaded either in abatement or bar of the action.⁸⁸

§ 6003. — In equity proceedings. While in an action at law, as has heretofore been seen, it is a general rule that even though the plaintiff alleges that it is a foreign corporation, that fact need not be proven unless it is put in issue by a specific denial, and the general issue is generally held not sufficient so to do, and pleading to the merits constitutes an admission of the character in which the plaintiff sues,⁸⁹ a different rule is held, in some jurisdictions, to obtain in chancery cases, where every allegation of fact not admitted, whether denied or not, must be proved, the failure to admit or deny being equivalent to a denial.⁹⁰ Consequently where the bill of complaint alleged that the complainant was a foreign corporation and the defendant did not by his answer admit such fact, but denied all matters not expressly admitted in the answer, it was held that such general denial put in issue the character in which the complainant sued and that proof on this point by the complainant was essential to his right to maintain the suit.⁹¹

In some cases, however, it is held that the same rule prevails in equity as in actions at law, and that it is not necessary in a suit by a foreign corporation to allege the corporate existence of the complainant.⁹² In some jurisdictions it is held that it is not incumbent

⁸⁶ See § 3070. See also *Law Guarantee & Trust Society v. Hogue*, 37 Ore. 544, 62 Pac. 380, rehearing denied 63 Pac. 690.

⁸⁷ See §§ 3065, 3068, 3069, 3070, 3073, supra. See also *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

⁸⁸ For consideration of nature of plea of nul tiel corporation in respect to whether it is a plea in bar, or a plea in abatement, or a plea in abatement or bar, see § 3070, supra.

⁸⁹ See § 6002, supra. See also *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211, distinguishing *Jones v. State*, 5 Sneed (Tenn.) 346; *Owen v. State*, 5 Sneed (Tenn.) 493, on the ground that they were criminal cases, and *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75,

on the ground that it was an action of ejectment dependent upon a statutory enactment.

⁹⁰ See §§ 3063, 3071, supra. See also *Fletcher's Equity Pl. & Pr.* §§ 314, 636, where it is said (§ 636): "A material fact alleged in the bill and denied by the answer must be proved. Where a material averment in a bill is neither admitted nor denied by the answer, it must be supported by proof."

For federal equity practice, see *New Federal Equity Rule* 30, 226 U. S. App'x. See also § 3071, supra.

⁹¹ *Bank of Jamaica v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211. See also *Elektron Mfg. Co. v. Jones Bros. Elec. Co.*, 8 Ohio Cir. Ct. 311.

⁹² See *Marine & Fire Ins. Co. v.*

upon a foreign corporation complainant to prove its corporate existence when the answer raises no question as to its existence or right to sue, but sets up a defense on its merits.⁹³

§ 6004. Necessity of pleading charter or corporate powers. Ordinarily when it becomes material in an action by a foreign corporation to determine what are its powers and rights it is not necessary to set out in extenso its charter, but it is sufficient to allege such powers and rights in general terms.⁹⁴ It may, however, under certain conditions be necessary to set forth in extenso the charter. Thus, in an action by a foreign corporation for an alleged libel, on demurrer to the declaration it was held that the charter of the plaintiff should be set out at length, in order that it might be seen whether the publication was false in stating the mode in which it authorized the business to be done and which was the subject of the criticism which constituted the alleged libel, and that the charter could not be treated as properly pleaded, when only brought before the court as a part of the alleged libelous publication.⁹⁵ Mere allegations of the effect of a foreign charter and by-laws not exhibited or set out are bad as conclusions of law.⁹⁶

Usually whether a contract was *ultra vires* is a matter of defense, and must be specially pleaded.⁹⁷ Where a foreign corporation plain-

Jauncey, 1 Barb. (N. Y.) 486; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370.

⁹³ Washington Life Ins. Co. v. Paterson Silk Co., 25 N. J. Eq. 160. See §§ 416, 3042, 3043, 3073, *supra*.

⁹⁴ For necessity of pleading charter and by-law provisions of corporation plaintiff and its corporate power or want of power, see §§ 3051-3054, *supra*. See also Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109.

A foreign corporation need not plead its organic statute to support the introduction of such foreign law in evidence. Paine v. Lake Erie & L. R. Co., 31 Ind. 283. See also § 429 *supra*.

An allegation that the corporation "under the laws of Pennsylvania" will admit proof of such laws. Gorton Steamer Co. v. Spofford, 5 N. Y. Civ. Proc. 116. And see to same effect, Saunders v. Sioux City Nursery, 6

Utah 431, 24 Pac. 532.

⁹⁵ Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519. See also § 3052, *supra*. It was held, also, in Hahnemannian Life Ins. Co. v. Beebe, 48 Ill. 87, 95 Am. Dec. 519, that the usual formula, to the effect that the defendant falsely and maliciously wrote, published, etc., would not be sufficient in a case of that character, for while it is sufficient in an action by a natural person, for words actionable in themselves, because the law presumes such person to be of good credit and character until the contrary is made to appear, it cannot be presumed that the legislature of a foreign state has not granted an unwise charter to a corporation.

⁹⁶ Clark v. Mutual Reserve Fund Life Ass'n, 14 App. Cas. (D. C.) 154, 43 L. R. A. 390.

⁹⁷ See § 3078, *supra*. See also Life

tiff sued to foreclose a mortgage securing a note and claimed that the note and mortgage were given in payment for land in the state owned by it and sold to the defendant, and the defendant pleaded that the corporation was not the owner of the note and mortgage and was not the real party in interest, it was held that the defendant could not, under the issue raised by the pleading, raise the question that the corporation could not hold title to real estate and consequently was unable to perform its contract.⁹⁸ In an action by a foreign life insurance company to foreclose a mortgage on real estate, if the defendant desires to raise the question of the authority of the plaintiff to lend money on real estate in the state, it is not sufficient for him to allege in his answer that the plaintiff did not have the legal capacity to lend money on mortgage security in the state, but he should plead the charter of the corporation or the laws of the state under which the corporation was organized and, on the trial of the action, prove the same.⁹⁹ In a suit by a foreign corporation, it is not necessary for the plaintiff to allege in its complaint that the contract sued upon by the plaintiff was within the scope of its corporate powers, unless such act is one not ordinarily incident to the powers and business of a corporation of that character.¹ In an action against a person who has contracted with a foreign corporation, he is not estopped to assert the objection that the complaint does not set forth sufficiently the charter under which the corporation claims its existence.²

XVIII. ACTIONS AGAINST FOREIGN CORPORATIONS

§ 6005. **In general.** The fact that a corporation has no existence except in legal contemplation gave rise to the conception that its existence could not be legally recognized outside of the territorial jurisdiction of the lawmaking power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the courts holding that the corporation could not be sued in an action for the recovery of a personal demand in a jurisdiction foreign to that which gave it existence.³

Ass'n of America v. Cook, 20 Kan. 19.

⁹⁸ *McKinley-Lanning Loan & Trust Co. v. Gordon*, 113 Iowa 481, 85 N. W. 816.

⁹⁹ *Life Ass'n of America v. Cook*, 20 Kan. 19. See §§ 3052, 3054, 3078, *supra*.

¹ *Connecticut Mut. Life Ins. Co. v. Cross*, 18 Wis. 109. See § 3054, *supra*.

² *Milligan v. State*, 86 Ind. 553.

³ *Reeves v. Southern R. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674. See also *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274; *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Middlebrooks v. Springfield Fire*

The manifest injustice of the rule thus enunciated soon became apparent. Justice Field in a leading case,⁴ said: "The doctrine of the exemption of a corporation from suit in a state other than that of its creation, was the cause of much inconvenience and often manifest injustice. The great increase of the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one state, they carry on the most extensive operations in other states. To meet and

Ins. Co., 14 Conn. 301; *Frick v. Hartford Life Ins. Co.*, 179 Iowa 149, 159 N. W. 247; *Peckham v. North Parish in Haverhill*, 16 Pick. (Mass.) 274; *Sullivan v. La Crosse & M. Steam Packet Co.*, 10 Minn. 386; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N. J. L. 57; *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 30 Barb. (N. Y.) 159; *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099; *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076; *Park Bros. & Co. v. Oil City Boiler Works*, 204 Pa. 453, 54 Atl. 334.

In a case decided in New York in 1819, the Supreme Court of New York, in considering the question whether the law of that state authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the state, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed, observing that if the president of the bank went to New York from another state, he would not represent the corporation there, and that "his functions and his character would not accompany him beyond the

jurisdiction of the government under whose laws he derived his character." *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but, nevertheless, it was cited with approval by the Supreme Court of Massachusetts, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the commonwealth. *Peckham v. North Parish in Haverhill*, 16 Pick. (Mass.) 274.

In *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. N. S. (N. Y.) 249, 255, *aff'd* 4 Hun (N. Y.) 712, the statement that the courts at common law "had no jurisdiction of the persons of foreign corporations," is followed by one that the statutes have provided no means "whereby the personal appearance" of them can be compelled, and this by a statement that "it is only in cases of voluntary appearance that our courts can have jurisdiction of the persons of foreign corporations." Obviously this means that the courts have the power to hear and determine if a process or appearance brings, or can bring, the corporation into court.

⁴*St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it was created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices there, it was in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that they should be held responsible in those courts to obligations and liabilities there incurred. All there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together, and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be deemed to represent it in the states for which they are respectively appointed, when it is called to legal responsibility for their transactions. The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents, for matters within the sphere of their agency, is, in effect, serving process on it as much as if such agents resided in the state where it was created.”⁵

⁵ See also *Western U. Tel. Co. v. Pleasants*, 46 Ala. 641; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Showen v. J. L. Owens Co.*, 158 Mich. 321, 133 Am. St. Rep. 376, 122 N. W. 640; *Barnett v. Chicago & L. H. R. Co.*, 4 Hun (N. Y.) 114.

The Supreme Court of Georgia, in considering the early doctrine that it was impossible for a corporation to migrate beyond the bounds of its creator, and, therefore, it could not be sued in a foreign jurisdiction, said: “While under this view as a matter of theory the corporation did not migrate, yet as a matter of fact its officers and agents did; and contracts were made in its name and wrongs committed by

its officers and agents, in territory far remote from that in which it was supposed to have its only legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery.” *Reeves v. Southern R. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674.

The more recent cases, in departing from the earlier doctrine in reference to suing a corporation and serving its officers or agents with process in another jurisdiction than that in which it was incorporated, do so upon the ground that a corporation, by doing business in another state or country than that by which it was created, impliedly submits to the jurisdiction of its courts in litigation relating to such business, and may be regarded, for such purpose, as constructively present in the officer or agent representing it in such business, so that service on such officer or agent is good service upon it.⁶ The Supreme Court of the United States has said: "The manifest injustice which would ensue, if a foreign corporation, permitted by a state to do business therein and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens of the laws of the state, has induced many states to provide by statute that a foreign corporation making contracts within the state shall appoint an agent residing therein, upon whom process may be served in actions upon such contracts. This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States held within the state, but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States."⁷

The doctrine enunciated in early American cases, which have been adverted to above, does not obtain in England, and it is there settled that a foreign corporation which does business in a country other than

⁶ *Barrow Steamship Co. v. Kane*, 170 U. S. 600, 42 L. Ed. 964; *Showen v. J. L. Owens Co.*, 158 Mich. 321, 133 Am. St. Rep. 376, 122 N. W. 640; *Libbey v. Hodgdon*, 9 N. H. 394; *Mercer v. Pennsylvania R. Co.*, 42 N. J. L. 490; *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111.

⁷ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964. See also *Shaw v. Quincey Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. Ed. 379; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451.

"The recognition of the hardship resulting from the rule that a corporation could not be sued in a jurisdiction foreign to that which gave it existence brought about a modification of the rule, to the extent that where a foreign corporation located an agent in a foreign jurisdiction, and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that jurisdiction as to make it amenable to the process of the courts thereof on all causes of action originating within that jurisdiction." *Reeves v. Southern R. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674.

that of its creation will be considered a resident and treated as if it were established by English law,⁸ and may be subjected to suit by service made upon one of its principal officers there residing and representing it in the realm.⁹

§ 6006. Requisites to jurisdiction to render personal judgment against foreign corporation. As has been seen elsewhere if a corporation has real or personal property in another state or country than that by which it was created, it may be proceeded against in such other state by attachment of the property, or some other similar proceeding, as in the case of any other nonresident, for the proceeding is in rem, and it is not necessary that the court shall acquire jurisdiction of the corporation.¹⁰ A jurisdiction in rem (or quasi in rem) may be had over the property of a foreign corporation, including debts owing to it, which may be and is attached by valid process of foreign attachment, but no judgment in personam can result from such process.¹¹ It is well settled, however, that a court of justice cannot acquire jurisdiction over the person of a defendant so as to render a judgment in personam against him except by actual service of notice within the jurisdiction upon him or by his waiver, by general appearance or otherwise, of the want of due service.¹² This

⁸ *Lhonneux v. Hong Kong & Shanghai Banking Corporation*, L. R., 33 Ch. Div. 446; *Nutter v. Messageries Maritimes*, 54 L. J. Q. B. 527; *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *Haggin v. Comptoir D'Escompte de Paris*, L. R. 23 Q. B. Div. 519, 58 L. J. Q. B. 508.

⁹ *Haggin v. Comptoir D'Escompte de Paris*, 7 Q. B. Div. 519; *Newby v. Von Oppen*, L. R. 7 Q. B. Div. 293. See *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

¹⁰ See § 3129, *supra*. See also:

Georgia. *Wilson v. Danforth*, 47 Ga. 676.

Massachusetts. *Potter v. Lapointe Mach. Tool Co.*, 201 Mass. 557, 88 N. E. 418.

Tennessee. *Brewer v. De Camp Glass Casket Co.*, 201 S. W. 145.

Texas. *Banco Minero v. Ross & Masterson* (Tex. Civ. App.), 138 S. W. 224.

Virginia. *Bank of United States v. Merchants' Bank of Baltimore*, 1 Rob. 573.

Wisconsin. *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

It is held in Louisiana that a foreign corporation which is a mortgage debtor may be proceeded against and the mortgage foreclosed via executiva, by appointing an attorney for the absentee. The court said: "The proceedings of foreclosure via executiva were in their nature in rem and are binding upon all parties in interest until set aside. The corporation being bound, a fortiori of the stockholders whose interests are represented by the corporation are bound." *Buck v. Massie*, 109 La. 776, 33 So. 767.

¹¹ See § 2977, *supra*; *Michigan Trust Co. v. Probasco*, 29 Ind. App. 109, 63 N. E. 255.

¹² *Clark v. Wells*, 203 U. S. 163, 51

principle is applicable to all courts and to corporations as well as to individuals.¹³

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them, and ¹⁴ the principles in relation to the acquisition of jurisdiction over nonresident defendants apply with the same force to foreign corporations as to natural persons.¹⁵ No personal judgment, but only one in rem against property can be rendered against a foreign corporation where it does not appear and no process to compel personal appearance is provided.¹⁶

L. Ed. 138; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540; *Goldey v. Morning News*, 156 U. S. 521, 39 L. Ed. 517; *Mexican Cent. R. Co. v. Pinckney*, 149 U. S. 209, 37 L. Ed. 699; *Pennoyer v. Neff*, 95 U. S. 715, 24 L. Ed. 565 (the leading case); *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970; *Vance v. Pullman Co.*, 160 Fed. 707; *Hammond v. Board of Trade*, 125 Fed. 463; *Potter v. Lapointe Machine Tool Co.*, 201 Mass. 557, 88 N. E. 418; *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

¹³ *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Parrott v. Alabama Gold Life Ins. Co.*, 5 Fed. 391.

¹⁴ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964. See *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457; *Thompson v. Meridian Life Ins. Co.*, Indianapolis, Indiana, 38 S. D. 570, 162 N. W. 373.

"The great weight of modern authority is to the effect that a foreign corporation may be sued where it is found just the same as an individual, and this we understand to be the holding of the federal courts themselves." *Vicksburg, S. & P. R. Co. v. Forcheimer*, 113 Miss. 531, 74 So. 418.

¹⁵ *St. Clair v. Cox*, 106 U. S. 350,

27 L. Ed. 222; *Fairfax Forrest Min. & Mfg. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024. See also *Sill v. Bank of United States*, 5 Conn. 102; *Potter v. Lapointe Machine Tool Co.*, 201 Mass. 557, 88 N. E. 418; *New York Life Ins. Co. v. Best*, 23 Ohio St. 105; *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 99 Pac. 1046, 102 Pac. 1.

¹⁶ *United States*. *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Vance v. Pullman Co.*, 160 Fed. 707. See also *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434; *United States v. American Bell Tel. Co.*, 29 Fed. 17.

Massachusetts. *Potter v. Lapointe Machine Tool Co.*, 201 Mass. 557, 88 N. E. 418.

New York. *Coolidge v. American Realty Co.*, 91 App. Div. 14, 86 N. Y. Supp. 318; *Ogdensburgh & C. R. Co. v. Vermont & C. R. Co.*, 16 Abb. Pr. (N. S.) 249, aff'd 4 Hun 712.

Oregon. *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Wisconsin. *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*,

The courts of a state cannot acquire jurisdiction of an action at law or suit in equity against a foreign corporation, so as to render a personal judgment against it unless the corporation comes within the jurisdiction of the state so that process may be served upon it, or unless it voluntarily appears and submits to the jurisdiction. If a foreign corporation is not doing business in a state, service of process upon an officer or agent who happens to come into the state, whether upon his own business or casually on business for the corporation, is not service upon the corporation and can give no jurisdiction as against it, for the agent or officer does not represent the corporation in such a case. And by the overwhelming weight of authority, this is true even where a statute authorizes service of process upon the officers or agents of foreign corporations.¹⁷ It is essential that a foreign

141 Wis. 70, 123 N. W. 640.

"The courts of this commonwealth apart from statute have no jurisdiction over a foreign corporation unless it voluntarily appears, except so far as its property may be attached, and then only to the extent of the property attached. *Andrews v. Michigan Central R. Co.*, 99 Mass. 534, 97 Am. Dec. 51; *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Eliot v. McCormick*, 144 Mass. 10." *Potter v. Lapointe Machine Tool Co.*, 201 Mass. 557, 88 N. E. 418.

By statute (*Hill's Ann. Laws Oregon*, § 516), no jurisdiction over foreign corporations exists unless they are doing business in the state or appear generally in the action. This is said by the court to be declaratory of the common law. *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876.

Such fact should appear in the record in order to support a default judgment against the corporation based upon service of process upon the resident agent of the corporation. *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046.

¹⁷ *United States. Kendall v. American Automatic Loom Co.*, 198 U. S. 477,

49 L. Ed. 1133; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, aff'g 110 Fed. 730; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970; *Cooper v. E. L. Welch Co.*, 218 Fed. 719; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.*, 190 Fed. 879; *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Vance v. Pullman Co.*, 160 Fed. 707; *Jackson v. Delaware River Amusement Co.*, 131 Fed. 134; *Martin v. New Trinidad Lake Asphalt Co., Ltd.*, 130 Fed. 394; *Greenleaf v. Railway Postal Clerks Nat. Ass'n*, 130 Fed. 209; *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235; *Strain v. Chicago Portrait Co.*, 126 Fed. 831; *Central Grain & Stock Exchange v. Chicago Board of Trade*, 125 Fed. 463; *Board*

corporation be present, or have been present, within the jurisdiction

man v. S. S. McClure Co., 123 Fed. 614; Scott v. Stockholders' Oil Co., 122 Fed. 835; Mecke v. Valleytown Mineral Co., 93 Fed. 697; Rust v. United States Water Works Co., 70 Fed. 129; United States Graphite Co. v. Pacific Graphite Co., 68 Fed. 442; Hazletine v. Mississippi Valley Fire Ins. Co., 55 Fed. 743; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 850; Reifsnider v. American Imp. Pub. Co., 45 Fed. 433; Benthif v. London & Colonial Finance Corporation, 44 Fed. 667; Clews v. Woodstock Iron Co., 44 Fed. 31; Golden v. Morning News of New Haven, 42 Fed. 112; St. Louis Wire-Mill Co. v. Consolidated Barb Wire Co., 32 Fed. 802.

California. Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270; Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393; Lawrence v. Ballou, 50 Cal. 258.

Connecticut. Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

District of Columbia. Lathrop v. Union Pac. Ry. Co., 7 App. Cas. 111; Ambler v. Archer, 1 App. Cas. 94; Dallas v. Atlantic, M. & O. R. Co., 2 MacArthur 146.

Illinois. Midland Pac. R. Co. v. McDermid, 91 Ill. 170; Schillinger Bros. Co. v. Henderson Brewing Co., 107 Ill. App. 335; Galveston City Ry. Co. v. Hook, 40 Ill. App. 547.

Louisiana. State v. North American Land & Timber Co., 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

Massachusetts. Potter v. Lapointe Machine Tool Co., 201 Mass. 557, 88 N. E. 418; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206; Peckham v. North Parish in Haverhill, 16 Pick. 274.

Michigan. Newell v. Great Western Ry. Co. of Canada, 19 Mich. 336. See also Showen v. J. L. Owens Co., 158

Mich. 321, 133 Am. St. Rep. 376, 122 N. W. 640.

Minnesota. State v. District Court of Ramsey County, 26 Minn. 233, 2 N. W. 698.

Mississippi. New Orleans, J. & G. N. R. Co. v. Wallace, 50 Miss. 244.

Missouri. Middough v. St. Joseph & D. C. R. Co., 51 Mo. 520; Latimer v. Union Pac. Ry. Co., 43 Mo. 105, 97 Am. Dec. 378; Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155; Walter A. Selnick Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Banister v. Weber Gas & Gasoline Engine Co., 82 Mo. App. 528.

New Jersey. National Condensed Milk Co. v. Brandenburg, 40 N. J. L. 111; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57; Puster v. Parker Mercantile Co. (N. J. Eq.), 59 Atl. 232.

New Mexico. Territory v. Baker, 12 N. M. 456, 78 Pac. 624, aff'd 196 U. S. 432, 49 L. Ed. 540.

New York. McQueen v. Middletown Mfg. Co., 16 Johns. 5.

Ohio. Riter-Conley Mfg. Co. v. Mzik, 23 Ohio Cir. Ct. 164.

Oregon. Multnomah Lumber Co. v. Weston Basket Co., 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046; Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 213, 1099; Farrell v. Oregon Gold-Min. Co., 31 Ore. 463, 50 Pac. 186, 49 Pac. 876; Aldrich v. Anchor Coal & Development Co., 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Pennsylvania. Phillips v. Library Co., 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; Nash v. Evangelical Lutheran Church, 1 Miles 78; Bank of Virginia v. Adams, 1 Pars. Eq. Cas. 534.

At to the effect of service upon an

in the persons of its agents there carrying on business and be well served, in order to give any jurisdiction in personam over it,¹⁸ but it need not be a citizen, resident or inhabitant in addition to being thus present, if the jurisdiction of the court can attach either because of the citizenship or residence of the other party,¹⁹ or because the subject-matter of the cause of action is physically or legally within the jurisdiction,²⁰ provided the character of the proceeding or the relief sought is such as the court can entertain and administer, and provided the cause of action is not local to some other jurisdiction.²¹ One of the conditions to jurisdiction in personam of foreign corporations has been said to be the existence of local legislation making them amenable to suit.²² Regardless of the correctness of this view, it may be safely said that such legislation will doubtless be found to have been enacted in every state.

officer casually or temporarily in the state, see § 6041, *infra*.

18 United States. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Cooper v. E. L. Welch Co.*, 218 Fed. 719.

District of Columbia. *Hoffman v. Washington, Virginia Ry. Co.*, 44 App. Cas. 418; *Lathrop v. Union Pac. Ry. Co.*, 7 App. Cas. 111, 1 MacArthur 234.

Minnesota. *Armstrong Co. v. New York Cent. & H. R. Co.*, 129 Minn. 104, 151 N. W. 917.

Ohio. *Barney v. New Albany & S. R. Co.*, 1 Handy 571.

South Carolina. *Tillinghast v. Boston & P. R. Lumber Co.*, 38 S. C. 319, 17 S. E. 31.

A foreign corporation is not suable in a state where it had no business and had not gone, and service being made only upon its president who was casually in the state is insufficient to sustain a judgment in personam. *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222. See § 6041, *infra*.

¹⁹ See §§ 2957, 2958, 2959, *supra*. See also *Rehm v. German Ins. & Sav. Institution*, 125 Ind. 135, 25 N. E. 173; *United States Health & Accident Ins. Co. v. Batt*, 49 Ind. App. 277, 97 N. E. 195; *Byers v. Union Cent. Life Ins.*

Co., 17 Ind. App. 101, 46 N. E. 475; *Pietrarvia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, *aff'g* 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249; *English v. New York, N. H. & H. R. Co.*, 161 N. Y. App. Div. 831, 146 N. Y. Supp. 963; *Mallory v. Virginia Hot Springs Co.*, 157 N. Y. App. Div. 253, 141 N. Y. Supp. 961; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

²⁰ See § 2959, *supra*, and cases there cited.

²¹ See §§ 2957, 2960, *supra*.

²² *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Armstrong Co. v. New York Cent. & H. River R. Co.*, 129 Minn. 104, 151 N. W. 917. See also *Potter v. Lapointe Machine Tool Co.*, 201 Mass. 557, 88 N. E. 418; *Gerrick & Gerrick Co. v. Llewellyn Iron Works*, — Wash. —, 177 Pac. 692.

See § 2957.

That failure of the state in which it is sitting to enact such legislation will not affect a federal circuit court's jurisdiction of an action against a foreign corporation, see *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

A judgment recovered against a foreign corporation in an action in which personal jurisdiction of the corporation is obtained, is not only valid in the state in which it is rendered, but must be recognized as valid in every other state and in the federal courts, for it is within the provision of the Federal Constitution and act of Congress requiring full faith and credit to be given in each state to the properly authenticated records and judicial proceedings of other states.²³ This, however, does not prevent a foreign corporation from attacking a judgment against it by showing that it is void for want of jurisdiction.²⁴ This question was considered by the Supreme Court of the United States, and it was there held that "when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation was engaged in business in the state. A transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose." And it was held in this case that, as there was nothing in the copy of the record of a judgment against a foreign corporation to show that the foreign corporation was engaged in business in the state in which the judgment was rendered at the time of the service of process on

²³ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451; *Reyer v. Odd Fellows' Fraternal Acc. Ass'n of America*, 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. E. 469; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N. J. L. 57.

²⁴ *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345; *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 49 L. Ed. 1133; *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111;

Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964; *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635; *National Metal Co. v. Greene Consol. Copper Co.*, 11 Ariz. 108, 9 L. R. A. (N. S.) 1062, 89 Pac. 535; *Thum v. Pyke*, 8 Idaho 11, 66 Pac. 157; *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046.

a person therein as its agent, and the return of the officer gave no information on the subject, it did not appear, even *prima facie*, that the court had jurisdiction to render a personal judgment against the corporation, and that the record, therefore, was not admissible in another state.²⁵

A judgment is void for want of jurisdiction if there was no sufficient appearance or submission to the jurisdiction by the corporation and the service of process was insufficient to bind it.²⁶

There is a difference of opinion in the federal courts as to whether a foreign corporation is present within a state or federal district where it only sends an agent there respecting a particular transaction. Rejecting the earlier decisions made when the statute required that it should be an inhabitant of or "found" within, the district, the majority rule is now said to be that in such a situation it is not present and not subject to state jurisdiction,²⁷ but some of the deci-

²⁵ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

See also *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635; *Gravelly v. Southern Ice Mach. Co.*, 47 La. Ann. 389, 16 So. 866; *Latimer v. Union Pac. Ry. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222, 25 N. J. L. 57; *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046.

²⁶ See § 6019 et seq., *infra*. See also *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

"It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise of the want of due service. Whatever

effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, quoted with approval in *Conley v. Mathieson Alkali Works*, 190 U. S. 405, 47 L. Ed. 1113, *aff'd* 110 Fed. 730.

The important distinction between a process sufficient to constitute due process of law and the efficacy of the process or service to confer jurisdiction over the corporation is illustrated in a case in the Supreme Court of the United States which conceding that by the state practice due process was satisfied, declined the jurisdiction and quashed the service though the state court would have treated the objection as a general appearance and proceeded to judgment reserving the jurisdictional question. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699.

²⁷ *Noel Const. Co. of Baltimore City v. George W. Smith & Co.*, 193 Fed. 492; *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889; *Wilkins v. Queen City Savings Bank & Trust Co.*, 154

sions announce a contrary view.²⁸ A federal court does not acquire jurisdiction of a foreign corporation by service of process upon one of its directors found in the state where such court is sitting, but residing elsewhere, where the corporation at the time of such service was not transacting business in the state by either an agent or one of its officers appointed to represent it in that state on whom the process could have been served, and there was no statute of that state making foreign corporations amenable to suits in that state as a condition to their transacting business therein.²⁹

In so far as public policy is invoked, the presence of the corporation doing business in the state is a factor in favor of retaining jurisdiction.³⁰ It has been denied that a tortfeasor defendant can urge the public policy in opposition to the assumption of jurisdiction, but the soundness of the decision is questionable.³¹

Where there is jurisdiction over a foreign corporation, it will not be declined merely because such action will not harm the plaintiff and will supposedly facilitate the taking of the proof in the action.³²

A charter provision that the corporation could be sued only in the

Fed. 173; *Ladd Metals Co. v. American Min. Co.*, 152 Fed. 1008; *Louden Machinery Co. v. Malleable Iron Co.*, 127 Fed. 1008; *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442; *Clews v. Woodstock Iron Co.*, 44 Fed. 31. See also *Smithson v. Roneo*, 231 Fed. 349; *Golden, Belknap & Swartz v. Connersville Wheel Co.*, 252 Fed. 904.

²⁸ *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505; *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605; *Houston v. Filer & Stowell Co.*, 85 Fed. 757.

²⁹ *Mecke v. Valleytown Mineral Co.*, 93 Fed. 697. See § 6021, *infra*.

³⁰ See *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164; *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401.

The operation of its railroad within the state and service there is mentioned as a reason for taking jurisdiction against a foreign corporation, but

no statute is cited making material that this was so, and as the action was transitory, jurisdiction might have been retained anyway. See *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401.

See also *St. Louis & S. F. R. Co. v. Hale*, — Tex. Civ. App. —, 153 S. W. 411; *St. Louis & S. F. R. Co. v. Arms*, — Tex. Civ. App. —, 136 S. W. 1164.

In earlier Texas cases where the fact appeared of operating a railroad within the state, the objection was made on ground of public policy, but was not sustained. *St. Louis & S. F. R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340.

³¹ *Atchison, T. & S. F. Ry. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478, holding that the public policy of entertaining the action is for the court to decide, and the tortfeasor has no interest therein and cannot urge or question it. See § 2957, *supra*.

³² *State v. Grimm*, 239 Mo. 135, 143 S. W. 483.

state by which it was created will not prevent the assumption of jurisdiction in a state where it does business.³³ Jurisdiction of a foreign corporation is not conferred by a charter provision that the corporation may sue or be sued "in all courts within the United States."³⁴

To obtain jurisdiction over a foreign corporation in an action brought against it in a state court, it is essential that there be a strict compliance with the provisions of the statutes of the state which confer jurisdiction upon the court.³⁵

§ 6007. Who may maintain suit against foreign corporation.

Where a foreign corporation is amenable to suit in another state or country than that by which it was created, it may be sued by a non-resident, unless there is some restriction on the right of nonresidents to maintain such a suit.³⁶ Under a statute providing that a foreign

³³ *Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951.

³⁴ *Lathrop v. Union Pac. Ry. Co.*, 1 MacArthur (D. C.) 234, holding that a Kansas corporation is not made suable where it has no office and does no business and has no agent, merely because a government grant extended all the privileges of the Union Pacific Railroad Company to it, among them that of suing and being sued in all courts within the United States.

³⁵ *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194; *Kernan v. Northern Pac. R. Co.*, 103 Wis. 356, 79 N. W. 403.

See §§ 2989, 3012, *supra*, § 6029, *infra*.

³⁶ *United States. Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Youmans v. Minnesota Title Insurance & Trust Co.*, 67 Fed. 282.

Georgia. *Hawkins v. Fidelity & Casualty Co.*, 123 Ga. 722, 51 S. E. 724; *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674, overruling *Bawknigh v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194; *South Carolina R. Co. v. Nix*, 68 Ga. 722.

Indiana. *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230.

Maryland. *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212.

Massachusetts. *Bence v. New York, N. H. & H. R. Co.*, 181 Mass. 221, 63 N. E. 417; *Johnston v. Trade Ins. Co.*, 132 Mass. 432.

Mississippi. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

New York. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

Pennsylvania. *Knight v. West Jersey R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200.

Texas. *Western U. Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395, 77 S. W. 433; *Mutual Life Ins. Co. of New York v. Nichols* (Tex. Civ. App.), 24 S. W. 910.

Wisconsin. *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664.

See also §§ 2957, 2959, *supra*.

This is the common-law rule. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

In construing a statute providing that foreign corporations doing busi-

corporation having a usual place of business in the state, must, before transacting business in the state appoint the commissioner of corporations its attorney upon whom process can be served in any action against it, and that such authority shall continue "so long as any liability remains outstanding against the company" in the state, it is held that the right to bring suit against the foreign corporation was not confined to citizens of the state but extended to nonresidents upon contracts made outside the state.³⁷

ness within the state may be sued in any court within the state having jurisdiction of the subject-matter in any county where the cause of action, or part thereof, accrued, or in any county where such company may have an agency or representative, it was held by a Texas court that a non-resident of that state might sue a foreign insurance company doing business in the state in any county in the state where such corporation had an agent and representative. The court said: "In the case before us, the statute having given jurisdiction of the defendant, the residence of the plaintiff is immaterial, she having voluntarily submitted to the jurisdiction of the court. We cannot hold, as appellant insists we should, that the statute must be construed to apply exclusively to citizens of this state, granting to them, only, the right to sue in this state, foreign corporations doing business in this state. Persons non-resident who are permitted, upon principles of comity, to sue nonresidents found within our jurisdiction, may avail themselves of the statute, and sue a foreign corporation found doing business here. The corporation doing business here by force of the statute is made amenable to our courts; and in applying the statute the question is not, who may sue? but, who may be sued? The statute declares that non-resident corporations, in a certain case, may be sued here, and provides for service upon them. The terms of the statute are fully met if they are

found here doing business, and, in our judgment, they may be sued by a nonresident plaintiff, at least upon the same terms that such plaintiff could sue a nonresident person found here; that is, in the same character of action. Indeed, we think the statute opens our courts to all persons having suits against such corporations upon the same terms as in suits against citizens of the state." *Mutual Life Ins. Co. of New York v. Nichols* (Tex. Civ. App.), 24 S. W. 910.

As to the effect of the South Carolina statute as restricting suits by nonresidents against foreign corporations, see *Central Railroad & Banking Co. v. Georgia Const. & Inv. Co.*, 32 S. C. 319, 11 S. E. 192.

³⁷ *Youmans v. Minnesota Title Insurance & Trust Co.*, 67 Fed. 282.

The Supreme Court of Massachusetts, in construing the act, held that the right to bring suit is not confined to citizens of the commonwealth, but extends to nonresidents upon contracts made outside of the state. In *Johnston v. Insurance Co.*, 132 Mass. 432, the contention of the defendant was, "that the court will not, in the absence of express statute authority, entertain jurisdiction of an action between a nonresident plaintiff and a foreign insurance company doing business in this state, upon a contract made out of the state, and insuring property in another state, where no attachment has been made, and no service had except upon the insurance commissioner." But the court, in re-

One foreign corporation may maintain an action against another foreign corporation, if the action could be maintained by an individual or by a domestic corporation, unless the jurisdiction of the court in respect to actions of such character is restricted by statute.³⁸ But the right of a foreign corporation to sue another foreign corporation may be restricted to a certain class of actions.³⁹ In New York, it is provided by statute that an action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action, but that an action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract made

ply to this proposition, said: "It is true the statute does not in express terms provide for the maintenance of such an action, nor does it prohibit its maintenance. The statute was not framed for that purpose; its object is simply to provide for serving upon such companies 'all lawful processes in any action or proceeding' against them. The words, 'all lawful processes in any action or proceeding,' must be held to include all actions which might lawfully be brought against a company thus having a domicile of business in this commonwealth. It is also true that the main purpose of the statute is to secure to our own citizens the benefit of our laws and tribunals in regard to contracts made with foreign insurance companies who do business in this state; and it contains particular provisions which clearly indicate this general purpose. But it is true of all our statutes, applicable to our own citizens, that their primary object is the benefit of our own citizens, and the security and protection of their rights. We have, however, always extended the privileges of our laws to nonresidents, and opened our courts to their litigation, if the defendant can be found here. *Anc. Chart.* 91, 192. And it was said by Chief Justice Chapman, in delivering the judgment in

Roberts v. Knights, 7 Allen 449, 452: 'It is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.' "

It is held in Georgia that a foreign corporation doing business in that state, and having its agents located therein for that purpose, may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in the state or otherwise, and that it is immaterial whether the plaintiff be a nonresident or a resident of the state, provided the enforcement of the cause of action would not be contrary to the laws and policy of the state. *Hawkins v. Fidelity & Casualty Co.*, 123 Ga. 722, 51 S. E. 724, citing *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674, which overruled *Baw-knight v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194.

³⁸ *Emerson, etc. v. McCormick Mach. Co.*, 51 Mich. 5, 16 N. W. 182.

See also §§ 2957, 5993, *supra*, and § 6008, *infra*.

³⁹ *Duquesne Club of Pittsburgh v. Penn Bank*, 35 Hun (N. Y.) 390. See *Colorado State Bank v. Gallagher*, 76 Hun (N. Y.) 310, 27 N. Y. Supp. 688.

within the state, or relating to property situated within the state, at the time of the making thereof. (2) Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state. (3) Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.⁴⁰ The discrimination between resident and nonresident plaintiffs is probably based upon reasons of public policy, that the courts of the state should not be vexed with litigations between nonresident parties over causes of action which arose out of the territorial limits of the state, and every rule of comity and of natural justice and of convenience is satisfied by giving redress in the courts of such state to nonresident litigants, where the cause of action arose or the subject-matter of the litigation is situated within the state.⁴¹ It is held under such a statute that a citizen or resident of the state, or a domestic corporation, can maintain an action against a foreign corporation for any cause of action, no matter where it arose.⁴² But an action by a nonresident plaintiff against a foreign corporation can be maintained only in the cases specified and in no case for a cause of action which arose outside of the state limits, as the jurisdiction of the courts is defined and limited and absolutely

⁴⁰ N. Y. Code Civ. Proc. § 1780.

By Laws 1913, c. 60, it was further provided that suit may be maintained by a nonresident where the foreign corporation is doing business in the state.

See for construction of New York statute, *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 N. Y. App. Div. 444, 40 N. Y. Supp. 871; *O'Brien v. Peoria Water Co.*, 5 N. Y. App. Div. 229, 39 N. Y. App. Div. 121; *Dela-ware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 N. Y. Misc. 230, 33 N. Y. Supp. 1081; *Selser Bros. Co. v. Potter Produce Co.*, 62 N. Y. St. Rep. 69, 80 Hun 554, 30 N. Y. Supp. 527, 23 N. Y. Civ. Proc. 348.

See also §§ 2957, 2958, 2959, *supra*.

It was held prior to the amendment of 1913 that such a statute was not repugnant to sec. 2 of Art. 4 of the Federal Constitution, as it made no

discrimination between citizens, but between residents and nonresidents. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625. See also *Duquesne Club of Pittsburgh v. Penn Bank*, 35 Hun (N. Y.) 390.

⁴¹ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

⁴² *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625. See also *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242, 93 N. Y. Supp. 776, *aff'g* 45 N. Y. Misc. 180, 91 N. Y. Supp. 902; *People v. American Loan & Trust Co.*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 76; *Babeock v. Schuylkill & L. Val. Ry. Co.*, 56 Hun (N. Y.) 649, 9 N. Y. Supp. 845; *Coffin v. Chicago N. P. Const. Co.*, 67 Barb. (N. Y.) 337; *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 30 Barb. (N. Y.) 159; *House v. Cooper*, 30 Barb.

confined to the cases specified.⁴³ Under such statute, in an action by a nonresident against a foreign corporation jurisdiction will not be conferred upon the court even though the parties to the action consent and agree that the court shall have jurisdiction of the controversy, and the court on its own motion may refuse to take jurisdiction and dismiss the action at any stage of the proceedings.⁴⁴ When so made dependent on the citizenship or residence of the other parties adverse to the corporation, a personal representative residing within the jurisdiction can sue it if the cause of action admits,⁴⁵ but a mere fiction to produce a resident party adverse to the corporation will not suffice.⁴⁶

§ 6008. Actions which may be brought against foreign corporations. In the absence of statute, suits against a foreign corporation,

(N. Y.) 157; *Ervin v. Oregon Ry. & Nav. Co.*, 62 How. Pr. (N. Y.) 490; *Prouty v. Michigan Southern & N. I. R. Co.*, 4 Thomp. & C. (N. Y.) 230.

⁴³ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Adams v. Penn Bank*, 35 Hun (N. Y.) 393; *Duquesne Club of Pittsburgh v. Penn Bank*, 35 Hun (N. Y.) 390; *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 30 Barb. (N. Y.) 159; *House v. Cooper*, 30 Barb. (N. Y.) 157; *Harriott v. New Jersey R. & Transp. Co.*, 2 Hilt. (N. Y.) 262; *Ervin v. Oregon Ry. & Nav. Co.*, 62 How. Pr. (N. Y.) 490, *aff'd* 28 Hun (N. Y.) 269; *Brooks v. Mexican Const. Co.*, 49 N. Y. Super. Ct. 234; *Chambers v. Feron & Ballou Co.*, 56 N. Y. Supp. 338.

⁴⁴ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526; *Ervin v. Oregon Ry. & Nav. Co.*, 62 How. Pr. (N. Y.) 490, *aff'd* 28 Hun (N. Y.) 269; *Brooks v. Mexican Const. Co.*, 49 N. Y. Super. Ct. 234. But see *Pease v. Delaware, L. & W. R. Co.*, 10 Daly (N. Y.) 459.

⁴⁵ *English v. New York, N. H. & H. R. Co.*, 161 N. Y. App. Div. 831, 146 N. Y. Supp. 963.

Under such statute a nonresident of the state who is appointed as administrator of the estate of a deceased person may not sue a foreign corporation in the courts of a state, as he does not become by such appointment in any sense a resident of the state. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

But an action may be maintained by a resident of the state who has received letters testamentary therein as executor of a nonresident decedent against a foreign corporation which has issued a policy of insurance on the life of the deceased nonresident. *Palmer v. Phoenix Mut. Life Ins. Co.*, 84 N. Y. 63.

Nonresidence of only one of several executors of a decedent who was a resident will not prevent jurisdiction over a foreign tort. *Mallory v. Virginia Hot Springs Co.*, 157 N. Y. App. Div. 252, 141 N. Y. Supp. 961.

⁴⁶ *Pietraroia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, *aff'g* 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249, holding that an action should be dismissed where a bank deposit was made to produce an appearance of assets within the state so as to have a resident

which may be subjected to the jurisdiction of the courts of another state or country than that by which it was created, are not confined to any particular class of cases.⁴⁷ In some jurisdictions, it is held that no action in personam can be maintained against a foreign corpora-

administrator to sue a foreign corporation on a foreign cause of action.

47 United States. International Harvester Co. v. Kentucky, 234 U. S. 579, 58 L. Ed. 1479; Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964; Smolik v. Philadelphia & R. Coal & Iron Co., 222 Fed. 148; Teti v. Consolidated Coal Co. of Maryland, 217 Fed. 443.

Arkansas. American Hardwood Lumber Co. v. T. J. Ellis & Co., 115 Ark. 524, 171 S. W. 899; American Casualty Co. v. Lea, 56 Ark. 539, 20 S. W. 416.

District of Columbia. Hoffman v. Washington-Virginia Ry. Co., 44 App. Cas. 418.

Georgia. City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Atlantic Coast Line R. Co. v. Stephens, 11 Ga. App. 520, 75 S. E. 841.

Illinois. Missouri River Tel. Co. v. First Nat. Bank, 74 Ill. 217; Pressed Radiator v. Hughes, 155 Ill. App. 80; Pennsylvania Co. v. Sloan, 1 Ill. App. 364.

Kansas. German Ins. Co. of Freeport v. First Nat. Bank, 58 Kan. 86, 62-Am. St. Rep. 601, 48 Pac. 592.

Kentucky. Chesapeake & O. R. Co. v. Cowherd, 96 Ky. 113, 27 S. W. 990.

Minnesota. See Armstrong Co. v. New York Cent. & H. R. Co., 129 Minn. 104, 151 N. W. 917.

Mississippi. Vicksburg, S. & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418; Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53; New Orleans, J. & G. N. R. Co. v. Wallace, 50 Miss. 244.

Missouri. See Robb v. Chicago & A. R. Co., 47 Mo. 540.

New Jersey. See National Condensed Milk Co. v. Brandenburg, 40 N. J. L.

111; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57.

Ohio. Handy v. Insurance Co., 37 Ohio St. 366.

Oregon. Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 213, 1099.

South Carolina. Abbeville Elec. Light & Power Co. v. Western Electrical Supply Co., 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559.

South Dakota. Thompson v. Meridian Life Ins. Co., Indianapolis, Indiana, 38 S. D. 570, 162 N. W. 373.

Tennessee. State v. Cumberland Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390, citing Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274. See Peters v. Neely, 84 Tenn. 275.

See also §§ 2924-2948, 2960, supra.

A corporation is "liable to suit in a foreign jurisdiction to the same extent and under the same circumstances as an individual. * * * The only difficulty in the way is a practical one. * * * If a company were to locate an office in another state, and its principal officer were to do business there, there could be no question of his liability to be served." City Fire Ins. Co. v. Carrugi, 41 Ga. 660.

The difficulty of serving a foreign corporation is technical rather than substantial, says the Virginia Court of Appeals, and speaking of one admitted to the state on an equality with domestic corporations and subject to the same liabilities, it was held suable on service made, as in case of a domestic corporation with its head office in another state but having property where the cause of action arose. Bal-

tion unless the contract sued on was made, or the injury complained of was suffered, in the state in which the action was brought.⁴⁸ But

timore & O. R. Co. v. Gallahue's Adm'rs, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

⁴⁸ Dozier Lumber Co. v. Smith-Isburgh Lumber Co., 145 Ala. 317, 39 So. 714; Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697; Louisville & N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 181, 23 So. 825; Richmond & D. R. Co. v. Trousdale, 99 Ala. 389, 42 Am. St. Rep. 69, 13 So. 23; Alabama G. S. R. Co. v. Chumley, 92 Ala. 317, 9 So. 286; Iron Age Pub. Co. v. Western U. Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; Louisville & N. R. Co. v. Dooley, 78 Ala. 524; Equitable Life Assur. Society v. Vogel, 76 Ala. 441; Central Railroad & Banking Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339; McDonald v. MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832; Rodgers v. Mutual Endowment Assessment Ass'n, 17 S. C. 406; Sawyer v. North American Life Ins. Co., 46 Vt. 697.

In Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 82 Am. Rep. 68, 25 So. 697, the court said: "Can a foreign corporation's property found in this state be attached and condemned to satisfy a demand growing out of a tort committed by it in another state? Without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, for the reason there was no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officers within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may

be, could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there could not bind the corporation. St. Clair v. Cox, 106 U. S. 354, 1 Sup. Ct. 354; Sullivan v. Timber Co., 103 Ala. 371, 15 South. 941. To meet and obviate this inconvenience, and oftentimes injustice, the legislature of this state has enacted statutes by which process may be served upon the agents of foreign corporations doing business in this state. We do not deem it important, to a correct decision of this case, to review these statutes. They do not materially differ, for the purpose here involved, from those in existence when the case of Railroad Co. v. Carr, 76 Ala. 388, was decided by this court. In that case the learned judge reviewed them at length, and, after an exhaustive examination of cases decided by other courts, held that a foreign corporation, though doing business in this state through its agents located here, could not be held liable by our courts for a tort committed by it in another state. We quote this conclusion in that opinion as he there so aptly and tersely states the doctrine by saying: 'We cannot think that it was the intention of the legislature, in any of the statutes we have been considering, to allow foreign corporations to be sued in this state, except on causes of action originating in this state, or on contracts entered into in reference to a subject-matter within this state. To hold otherwise would allow foreign corporations which transact business in Alabama to be drawn into our courts for the adjudication of every contract they may make, and every tort and wrong they may be charged with committing, even in the state which gave

the weight of modern authority is to the effect that a foreign corpora-

them being.' This doctrine is reaffirmed in the case of *Railroad Co. v. Dooley*, 78 Ala. 524, where a resident of this state sued out an attachment against a resident of the state of Kentucky, and the only service effected was a writ of garnishment on the Louisville & Nashville Railroad Company, a foreign corporation; this court holding that this mode of service can be resorted to only in causes of action originating in this state, or on contracts entered into with reference to a subject-matter within this state. The case of *Railroad Co. v. Carr* is cited approvingly in the cases of *Railroad Co. v. Trousdale*, 99 Ala. 394, 13 South. 23; *Railroad Co. v. Williams*, 113 Ala. 402, 21 South. 938; *Railroad Co. v. Chumley*, 92 Ala. 317, 9 South. 286. These cases clearly refused the relief sought by the plaintiffs in each because the court was without jurisdiction to hear and determine their causes of action. As being persuasive of the correctness of the interpretation of the legislative intent as declared in *Railroad Co. v. Carr*, supra, we call attention to subdivision 2 of section 669, Code 1896 (section 3414, Code 1886), in which the jurisdiction of the courts of chancery is limited, as against nonresidents, to causes of action arising in this state, or the act on which the suit is founded was to have been performed in this state; and the case of *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449, in which it is construed."

The Supreme Court of Georgia in *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674, considered the change in the views of the courts in reference to the liability of a foreign corporation to be sued in a jurisdiction other than that by which it was created, and the case will be found to be in-

structive upon the questions now being considered.

Under a statute providing that foreign corporations doing business in the state shall constitute and appoint an agent residing in the state and authorized by a written appointment to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within the state in which such corporation shall be a party, and that such corporation shall have and keep continually such a resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business in the state, and service upon him shall be taken and held as due service on such corporation notwithstanding his refusal on any ground to accept service voluntarily, it was held by a federal court that a foreign corporation cannot be brought into court in such state by service upon the statutory agent of compulsory process, at the suit of a nonresident to defend its rights in a transitory action based entirely upon transactions in another state. The court said: "According to what I deem to be the only true construction of the statute, foreign corporations are not obliged to confer authority upon their agents within this state to represent them in litigation which does not pertain to either property situated within this state, or business conducted or carried on in this state, or transactions within this state; and that an agent of a foreign corporation having only the authority which the statute requires foreign corporations to confer is not a representative through whom a foreign corporation can be coerced to submit for adjudication any other controversy, and that the cause of action alleged in the plaintiff's complaint in this case can-

tion may be sued in a transitory cause of action in any jurisdiction where it can be found in the sense that service of process may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served.⁴⁹ When a cause of action is transitory, jurisdiction may be taken in a proper venue, though the defendant is a

not be litigated within this state so long as the defendant declines to waive its legal objections to the jurisdiction of the courts." *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017, distinguishing *Smith v. Empire State-Idaho Mining & Development Co.*, 127 Fed. 462, where the same court sustained the validity of service upon the secretary of a foreign corporation having its principal office within the state, the service having been made upon the secretary pursuant to an express statutory provision authorizing service of summons in a civil action to be made upon such officer.

⁴⁹ *United States. Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. Ed. 695; *Stone v. United States*, 167 U. S. 178, 42 L. Ed. 127; *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11, 26 L. Ed. 439; *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970.

Georgia. Reeves v. Southern Ry. Co., 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Atlantic Coast Line R. Co. v. Stephens*, 11 Ga. App. 520, 75 S. E. 841.

Illinois. Pressed Radiator Co. v. Hughes, 155 Ill. App. 80.

South Carolina. Abbeville Elec. Light & Power Co. v. Western Electrical Supply Co., 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559.

South Dakota. Thompson v. Meridian Life Ins. Co., 38 S. D. 570, 162 N. W. 373.

Virginia. Deatricks' Adm'r v. State

Life Ins. Co., 107 Va. 602, 59 S. E. 489.

In *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53, the court extensively reviewed the cases, and said: "Until the hearing of the able and exhaustive oral argument of appellant's counsel in support of this assignment, we had supposed there was, in our own state, no ground left for dispute that in transitory actions, whether in tort or on contract, our courts were wide open to any suitor, resident or nonresident, against his adversary, whether resident or nonresident, whether a natural person or an artificial one, regardless of where the right of action occurred, if only the courts had jurisdiction of the subject-matter, and could obtain jurisdiction of the party, either by a voluntary appearance, or by service of process. We are aware that there is some divergence of opinion on this subject between the courts of last resort in this country, and that apparent authority can be found for holding that a foreign corporation resident in one state may not be sued in another state by a resident of the first state on a cause of action arising in the first state. But even these cases will be found to be governed by the peculiar statutes of the state declining to take jurisdiction, or that the refusal to take jurisdiction rested upon some unusual circumstances which deterred the court from entertaining the suit, or because of a supposed distinction between statutory rights and common-

foreign corporation,⁵⁰ unless, as in some states, the statute excludes

law rights. But in many states, and among them our own, the rule we first announced has been firmly established by repeated adjudications."

⁵⁰ **United States.** *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. Ed. 695; *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970; *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017; *Hills v. Richmond & D. R. Co.*, 37 Fed. 660; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 5 McLean 444, Fed. Cas. No. 10,321.

Arkansas. *American Hardwood Lumber Co. v. T. J. Ellis & Co.*, 115 Ark. 524, 171 S. W. 899; *St. Louis, I. M. & S. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865.

Georgia. *Atlantic Coast Line R. Co. v. Stephens*, 11 Ga. App. 520, 75 S. E. 841.

Illinois. *Frank Simpson Fruit Co. v. Atchison, T. & S. F. R. Co.*, 245 Ill. 596, 92 N. E. 524, rev'g 152 Ill. App. 235; *Pressed Radiator Co. v. Hughes*, 155 Ill. App. 80.

Michigan. *National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co.*, 168 Mich. 195, 131 N. W. 580.

Mississippi. *Vicksburg, S. & P. R. Co. v. Forcheimer*, 113 Miss. 531, 74 So. 418; *Pullman Palace Car Co. v. Lawrence*, 74 Misc. 782, 22 So. 53; *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. 59; *Chicago, etc., Railroad Co. v. Doyle*, 60 Miss. 977; *New Orleans, I. & G. N. R. Co. v. Wallace*, 50 Miss. 244.

New Jersey. *Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577.

New York. *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303, the law being changed afterwards by Code Civ. Proc. § 1780.

Oregon. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099.

Texas. *Western U. Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395, 77 S. W. 433; *Atchison, T. & S. F. R. Co. v. Keller*, 33 Tex. Civ. App. 358, 76 S. W. 801; *Sorkin v. Houston, E. & W. T. Ry. Co. (Tex. Civ. App.)*, 53 S. W. 608; *American Well Works v. De Aguayo (Tex. Civ. App.)*, 53 S. W. 350; *Mutual Life Ins. Co. of New York v. Nichols (Tex. Civ. App.)*, 24 S. W. 910, aff'd 26 S. W. 998.

Virginia. *Deatrick's Adm'r v. State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489.

West Virginia. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

See § 2957, *supra*.

In holding that where a foreign corporation doing business in the state is duly served with process, the state court had jurisdiction to render personal judgment against a foreign corporation in a transitory cause of action which arose outside of the state, *Smith, J.*, in *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970, said: "It is not believed that any decision of a federal court can be found holding that where service was had upon the agent of a foreign corporation doing business within the state where suit is brought, such service is not good because the cause of action did not arise in that state. The statutes of the various states providing for service upon foreign corporations seem to be based upon the theory that an agent doing the business of a corporation in a state brings the corporation itself into the state, and that it may fairly be presumed that such agent would notify the governing body of the corporation of any service of citation upon him. No such presumption may be indulged in cases where there is substituted service upon an official of

or limits such jurisdiction⁵¹ or leaves it to a measure of judicial discretion,⁵² or the public policy forbids.⁵³ Of course, the right either of a nonresident or resident plaintiff to sue a foreign corporation upon a foreign cause of action is subject to this qualification: that it would not be against the policy of the state in which the suit is brought to enforce the cause of action arising outside of its jurisdiction. The comity of states would not require the courts of a state to enforce a cause of action when to do this would be contrary to the established policy of the state.⁵⁴

the state and not upon an agent of the corporation."

For a tort committed by a foreign corporation within a state, the corporation may be sued in such state, if found within the state in the person of an officer or agent upon whom process may be served. *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. 436. See § 5892, *supra*.

It is held in Massachusetts that a nonresident may sue a foreign insurance company, which does business in that state, on a contract made in another state where the subject-matter of the contract is also situated, although the only service made is on the insurance commissioner, whom all foreign insurance companies are required to appoint as their attorney for the service of process. *Johnston v. Trade Ins. Co.*, 132 Mass. 432; See *State v. North American Land & Timber Co.*, 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

⁵¹ See §§ 2957, 2959, 2960, *supra*. See also N. Y. Code Civ. Proc. § 1780.

⁵² *Waisikoski v. Philadelphia & R. Coal & Iron Co.*, 173 N. Y. App. Div. 538, 159 N. Y. Supp. 906. See also *Pietrarroia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, *aff'g* 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249.

A statute providing that "action against a foreign corporation may be maintained by another foreign corporation or by a nonresident in one of

the following cases only," etc., is permissive, the words "may be maintained" implying a discretion to take or refuse jurisdiction where the cause of action is a foreign tort and the corporation is merely doing business in the state. *Waisikoski v. Philadelphia & R. Coal & Iron Co.*, 173 N. Y. App. Div. 538, 159 N. Y. Supp. 906. (In the foregoing case one judge dissented from this conclusion but concurred in the reversal of an order which dismissed the action in supposed obedience to the reversed case.) See also *Pietrarroia v. New Jersey & H. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120, *aff'g* 131 N. Y. App. Div. 829, 116 N. Y. Supp. 249.

⁵³ *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Walker v. Rein*, 14 N. D. 608, 106 N. W. 405; *Bankers' Casualty Co. v. Richland County Banking Co.*, 31 Ohio Cir. Ct. 428.

⁵⁴ *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674. The court said: "The fact that a corporation has no existence except in legal contemplation gave rise to the conception that its existence could not be recognized outside of the territorial jurisdiction of the lawmaking power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the courts holding that the corporation could not

An action brought to recover for injury to personal property in

be sued in a jurisdiction foreign to that which gave it existence. While, under this view, as a matter of theory the corporation did not migrate, yet as a matter of fact its officers and agents did; and contracts were made in its name, and wrongs committed by its officers and agents, in territory far remote from that in which it was supposed to have its own legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery. The recognition of the hardship resulting from this rule brought about a modification of the rule to the extent that, where a foreign corporation located an agent and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that jurisdiction as to make it amenable to the process of the courts thereof on all causes of action originating within that jurisdiction. The rule was then further modified to the extent that, where the corporation had an agent and was doing business in a foreign jurisdiction, it might be sued upon any transitory cause of action by a citizen of the state in which the corporation was thus doing business. And in this country it followed from this rule that, if a resident was allowed to bring this suit, any citizen of the United States would, under the Constitution of the United States, have a similar right to bring suit. *South Carolina Railroad Co. v. Nix*, 68 Ga. 572 (2), 580; *Barrell v. Benjamin*, 15

Mass. 354; *Cole v. Cunningham*, 133 U. S. 107, 113, 114, * * *. There are many years and manifold changes in economic conditions between the old rule, which denied the right to sue a foreign corporation in personam outside of the jurisdiction of its creation, and the modern doctrine that the question of jurisdiction and suability is not so much one of citizenship as one of finding. See *Williams v. Ry. Co.*, 90 Ga. 522, 16 S. E. 303; *Dearing v. Bank*, 5 Ga. 497, 48 Am. Dec. 300. The development of the principle was by gradual steps, and necessarily involved the overturning of many old cases. * * * The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted. A corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction, and suits may be maintained against it in that jurisdiction if the laws of the same provide a method for perfecting service on it by serving its agents. * * * Of course, the right either of a nonresident or resident plaintiff to sue a foreign corporation upon a foreign cause of action is subject to this qualification; that it would not be against the policy of the state in which the suit is brought to enforce the cause of action arising outside of its jurisdiction. The comity of the states would not require the courts of this state to enforce a cause of action when to do this would be contrary to the established policy of the state. *Pol. Code* 1895, § 9; *American Colonization Society v. Gartrell*, 23 Ga. 448. Subject to this qualification, foreign corporations may sue in this state on

another state,⁵⁵ or for injury to the person,⁵⁶ or on an insurance policy,⁵⁷ is transitory.

It would seem that by submitting to the jurisdiction a foreign corporation does so for all purposes and not merely those acts done within the state, and that it may be sued on causes not related to such business or not arising within the state.⁵⁸ Where the jurisdiction is not

any cause of action, and may likewise be sued, provided they are found and duly served according to law. At common law service upon a corporation could be perfected only by serving its head officer, but whether service upon any other officer would be sufficient to bring the corporation into court is a matter to be determined by municipal law. The law of this state permits its own corporations to be brought into court by serving any officer or agent transacting the business of the corporation, and the statute is broad enough to allow service upon a foreign corporation in the same way. The state of Georgia either expressly grants to these foreign corporations the right to do business within its limits, or tacitly permits them to transact business here. They are allowed to open offices in this state, and here deal with our citizens and others who may be temporarily within its limits. The state protects them in the property which they hold. The courts of Georgia are open to them for the enforcement of any claim of any character which they may have against her citizens or citizens of other states passing through this state, subject only to the qualification above referred to. Can it be said that it is a hard rule, or a violation of any sound principle, that they should be put upon the same footing as to causes of action against them as our own corporations are placed upon by the law of the land?"

⁵⁵ *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Southern Pac. Co.*

v. Graham, 12 Tex. Civ. App. 565, 34 S. W. 135.

Damages to property partly personal is transitory as to the latter. *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135.

⁵⁶ *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. Ed. 695; *Stone v. United States*, 167 U. S. 178, 42 L. Ed. 127; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Atchison, T. & S. F. R. Co., v. Weeks*, 248 Fed. 970; *Atlantic Coast Line R. Co. v. Stephens*, 11 Ga. App. 520, 75 S. E. 841; *Atchison, T. & S. F. Ry. Co. v. Worley* (Tex. Civ. App.), 25 S. W. 478.

A railroad corporation created by the state of Maryland was held liable to an action in the courts of the District of Columbia by a passenger for an injury happening in the state of Virginia. *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354.

⁵⁷ *Barnes v. Union Cent. Life Ins. Co.*, 168 Ky. 253, 182 S. W. 169; *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Mutual Life Ins. Co. of New York v. Nichols* (Tex. Civ. App.), 24 S. W. 910, aff'd 26 S. W. 998. See, however, *Rodgers v. Mutual Endowment Assessment Ass'n*, 17 S. C. 406.

⁵⁸ *United States. International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479.

Arkansas. American Casualty Co. v. Lea, 56 Ark. 539, 20 S. W. 416.

Illinois. Pennsylvania Co. v. Sloan, 1 Ill. App. 364.

limited to business done within the state, either by the statutory provisions relating to the mode of service of process, or those relating to the jurisdiction of the subject-matter, an action may be maintained against the corporation, either in the federal or state courts, on a cause of action not arising out of the business transacted within the state.⁵⁹ In a late federal case, however, the doctrine was announced that by doing business within a state the foreign corporation consented to be sued and served under the statute only in respect to business there done. Accordingly, not only must the foreign corporation be doing business in the state where it is sued, but the cause must be one arising out of the business there done, else the state court, or a federal court to which removal is had, is without jurisdiction if both parties be foreign.⁶⁰ This was decided on the authority ascribed to decisions of the United States Supreme Court,⁶¹ but, as pointed out elsewhere in this work, they do not support it and it ought not to be regarded as a precedent for the rule broadly stated by it, but should be limited to the doctrine as explained in a prior part of this work.⁶²

Kansas. *German Ins. Co. of Freeport v. First Nat. Bank*, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

Kentucky. *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990.

Ohio. *Handy v. Insurance Co.*, 37 Ohio St. 366.

Oregon. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099.

Tennessee. *State v. Cumberland Telephone & Telegraph Co.*, 114 Tenn. 194, 86 S. W. 390, citing *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274.

When a corporation comes into the state it "subjects itself to the same legal environments that encompass other litigants," and it may be sued on a cause of action which arose without the state. *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990.

Where a foreign insurance corporation has filed its actual consent to be served through service on the state auditor with "the same effect as if served personally," etc., such a service will confer jurisdiction to try causes not arising out of the business

of insurance, e. g., libel. *American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416.

Although insurance is the only business carried on in the state by a foreign corporation, jurisdiction is not limited to actions growing out of it, and it may be sued to enforce its liability as a stockholder in a domestic corporation. *German Ins. Co. of Freeport v. First Nat. Bank*, 58 Kan. 86, 62 Am. St. Rep. 601, 48 Pac. 592.

By entering the state and transacting business therein, a foreign corporation becomes amenable to the laws of the state exactly as a private individual or a domestic corporation. *State v. Cumberland Telephone & Telegraph Co.*, 114 Tenn. 194, 86 S. W. 390.

⁵⁹ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

⁶⁰ *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893.

⁶¹ *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492; *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345.

⁶² See note 84 to § 2957, *supra*.

"In support of its contention that

As is elsewhere seen, however, the legislature of a state may restrict

it is not subject to the jurisdiction of our courts as regards promissory notes not made or negotiated by it in this state, and that the service of process was not due process of law against it in respect thereof, the defendant relies on the cases of *Old Wayne Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, and *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492. But the question decided in those cases is not the one before us. In *Old Wayne Life Ass'n v. McDonough* an action was brought in Pennsylvania upon an insurance contract executed in Indiana by an Indiana corporation. That corporation, although doing business in Pennsylvania, did not file the stipulation as to service of process upon the insurance commissioner, which by the statute of Pennsylvania was required of all foreign insurance companies doing business in that state. The service was made on the insurance commissioner. No legal notice was given to the association, and it did not appear in the suit. The service was held to be invalid. The court said: 'While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business.' The principle laid down, as we understand it, is that while a foreign corporation is estopped to take advantage of its failure to file the stipulation required by law, if the cause of action arose in the state seeking to impose the liability, the estoppel will not be

extended to a case where the cause of action did not arise out of business transacted in that state. The same principle was applied in the *Simon Case*. The plaintiff brought an action in the courts of Louisiana against a Virginia corporation, for an alleged tort committed in Alabama. The railway company had not designated an agent upon whom service might be made, as the local statute required of foreign corporations doing business in the state; nor in fact was it determined that the company was doing business in Louisiana. Service of the summons was made on the assistant secretary of state, no notice of the suit was given to the railway, and it made no appearance. The 'implied assent,' or estoppel arising out of the railway's failure to provide for the statutory service, was not extended to the cause of action arising in another state, and the service was held not to be sufficient to give the court jurisdiction. In neither of these cases did the court decide that a foreign corporation engaged in business in another state, which has filed the required appointment of a statutory agent, is not subject to the jurisdiction of the latter state in transitory actions originating outside that state. In such case presumably the jurisdiction would depend, not on implied assent or estoppel but on the scope of the statutory appointment, as construed by the court. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U. S. 93, 61 L. Ed. 610; *Mining & Milling Co. v. Fire Ins. Co.*, 267 Mo. 524, 184 S. W. 999; *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407; *Smolik v. Phila. & Reading Coal & Iron Co.* (D. C.) 222 Fed. 148. Much less did the court, in the *Old Wayne* and *Simon Cases*, pass upon the ques-

the right to bring suit against a foreign corporation to a certain class or classes of cases, and such legislation is held to be constitutional.⁶³ The common-law doctrine that the parties could come into court and litigate any transitory action,⁶⁴ has been modified in some states by statutes denying jurisdiction to their courts where a nonresident sues a foreign corporation, unless the cause of action arose within the state, or the contract sued on was made there or broken there, or the subject-matter of the action is located there.⁶⁵ The statutes in provid-

tion before us, namely the effect of service on an agent voluntarily appointed by a foreign corporation. In the *Simon Case* the court expressly refrained from passing on this question, saying: “* * * Without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the court below, that in this case the cause of action arose within the state of Alabama, and the suit therefor, in the Louisiana court, was served on an agent designated by a Louisiana statute.” It having been adjudicated that the defendant corporation was engaged in business in Massachusetts, that it had subjected itself to the jurisdiction of our courts by the voluntary appointment of an agent representing it generally, and that the service of process upon it was adequate, we are of opinion that the jurisdiction of the court was not limited to causes of action arising in this commonwealth.” *De Courey, J.*, in *Reynolds v. Missouri, K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913.

In *Hoffman v. Washington-Virginia Ry. Co.*, 44 App. Cas. (D. C.) 418, the court distinguished *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492, and *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, and cited *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, to the proposition that when

a corporation is present by its own agents “it is as much liable to the service of process in a transitory action as would be an individual.”

In *Atchison, T. & S. F. Ry. Co. v. Weeks*, 248 Fed. 970, *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, and *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492, are distinguished, and it is pointed out that in those cases “substituted” service was had, and in neither case was service had upon an agent of the corporation, and therefore, if good at all, it could be good only in cause of action arising out of the business of the corporation in the state where the suit was brought. See also *Vicksburg, S. & P. R. Co. v. Forcheimer*, 113 Miss. 531, 74 So. 418, distinguishing *Old Wayne Mut. Life Ass’n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, and *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492, *Stevens, J.*, saying: “The jurisdiction in each of these two cases was obtained by service of process upon an agent designated by state statute, and not upon an officer or bona fide agent of the defendant company.”

⁶³ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274.

See also § 6007, *supra*.

⁶⁴ See §§ 2957, 2959, *supra*.

⁶⁵ See §§ 2957, 2959, 6007, *supra*.

Formerly it was held in Maryland that a nonresident could sue a foreign corporation only when the subject of the action was within the state. But by Laws 1908, c. 240, it was provided

ing for a mode of service on designated persons or registered agents

that a nonresident can sue a foreign corporation "for any cause of action." *Noel Const. Co. v. George W. Smith & Co.*, 193 Fed. 492; *Hagerstown Brewing Co. v. Gates*, 117 Md. 348, 83 Atl. 570. See *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197. See § 2959, note 6, *supra*. Under this statute (*Laws Maryland 1908, c. 240*), a foreign corporation may be sued by a domestic one on a contract made in Maryland to be performed in Illinois. *Noel Const. Co. v. Geo. W. Smith & Co.*, 193 Fed. 492.

Formerly in Indiana jurisdiction was entertained over suits against foreign insurance companies only when they grew out of contracts of insurance. *Rehm v. German Ins. & Sav. Institution*, 125 Ind. 135, 25 N. E. 173; *Byers v. Union Cent. Life Ins. Co.*, 17 Ind. App. 101, 46 N. E. 475; but since such cases were decided, by statute (*Burns' St. 1908, § 4798*), jurisdiction was extended to "any claim or demand of any character whatever," and it is held that a citizen may sue a foreign insurance company on an account stated. *United States Health & Accident Ins. Co. v. Batt*, 49 Ind. App. 277, 97 N. E. 195. See also *Grover v. American Exp. Co.*, 11 Fed. 386, construing an Indiana statute to restrict actions against foreign express companies to causes of action arising in the state.

As to the Michigan statute relative to suits against foreign corporations, see *Compiled Laws of Mich. 1915, § 12340*. See *Grand Trunk Ry. Co. of Canada v. Wayne Circuit Judge*, 106 Mich. 248, 64 N. W. 17; *Newell v. Great Western Ry. Co.*, 19 Mich. 336.

By statute in New York it was, prior to 1913, provided as follows:

"An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract, made within the state, or relating to property situated within the state, at the time of the making thereof. (2) Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state. (3) Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state." See *N. Y. Code Civ. Proc. § 1780*.

Under this statute, the jurisdiction of the courts was defined and limited and absolutely confined to the cases specified, and it was held to be not sufficient that a nonresident plaintiff should by any service of process, or in any other way, obtain jurisdiction of a foreign corporation; but before an action could be maintained in any court of the state, there must also be jurisdiction of the subject-matter of the action. Jurisdiction of the action could not be conferred upon the court by any consent or stipulation of the parties or any conduct on their part, and the objection to the jurisdiction of the court in a suit against a foreign corporation might be taken at any stage of the action, and the court might *ex mero motu*, at any time when its attention was called to its lack of jurisdiction of the cause, refuse to proceed further, and dismiss the action. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Galt v. Provident State*

of foreign corporations are not to be construed as limiting jurisdiction

Bank, 18 Abb. N. Cas. (N. Y.) 431; Chase v. Vanderbilt, 37 N. Y. Super. Ct., 334, aff'd 62 N. Y. 307. As said by Danforth, J.: "There are no doubt many cases, where the court, having jurisdiction over the subject-matter, may proceed against a defendant who voluntarily submits to its decision but where the state prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact." *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526, quoted with approval in *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625.

Under this statute prior to its amendment in 1913, a nonresident of the state could not maintain an action against a foreign corporation for false imprisonment, unless the cause of action arose within the state. *Bennett v. Austro-American S. S. Co.*, 161 N. Y. App. Div. 753, 147 N. Y. Supp. 193, holding that where the imprisonment of a passenger on a steamship began on the high seas and continued until after the vessel was docked in New York City, a cause of action for the continued false imprisonment arose within the state.

Under such a statute, it was held that the fact of the plaintiff's being a resident of the state need not be alleged, and unless it affirmatively appeared that the plaintiff in an action against a foreign corporation was not a resident of the state, the complaint was not demurrable on the ground of want of jurisdiction. *Herbert v. Montana Diamond Co.*, 81 N. Y. App. Div. 212, 80 N. Y. Supp. 717; *Carter v. Herbert Booth King & Bro. Pub. Co.*, 26 N. Y. Misc. 652, 56 N. Y. Supp. 382.

The lack of jurisdiction of the court must affirmatively appear on the complaint, in order to render it subject to demurrer. *Brown v. Traders' Life & Accident Ins. Co.*, 21 N. Y. App. Div. 42, 47 N. Y. Supp. 253; *MacGinniss v. Amalgamated Copper Co.*, 45 N. Y. Misc. 106, 91 N. Y. Supp. 591; *Sims v. Bonner*, 60 N. Y. Super. Ct. 70. See also *Gurney v. Grand Trunk Ry. Co.*, 59 Hun (N. Y.) 625, 14 N. Y. Supp. 321, 13 N. Y. Supp. 645; *Campbell v. Texas Cent. R. Co.*, 15 N. Y. Misc. 442, 37 N. Y. Supp. 213; *Hand v. Society for Savings*, 18 N. Y. Supp. 157, aff'd 19 N. Y. Supp. 910. See, however, *Voshefsky v. Hillside Coal & Iron Co.*, 21 N. Y. App. Div. 168, 47 N. Y. Supp. 386; *O'Reilly v. New Brunswick, A. & N. Y. Steamboat Co.*, 28 N. Y. Misc. 112, 59 N. Y. Supp. 261. See for cases involving sufficiency of such averment, *Clegg v. Cramer*, 3 How. Pr. N. S. (N. Y.) 128.

See, for causes of action held to arise within the state, *Wester v. Casein Co. of America*, 206 N. Y. 506, Ann. Cas. 1914 B 377, 100 N. E. 488, rev'g 140 N. Y. App. Div. 442, 125 N. Y. Supp. 335; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, aff'g 21 Hun 166; *Hiller v. Burlington & M. R. Co.*, 70 N. Y. 223; *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 N. Y. App. Div. 444, 40 N. Y. Supp. 871; *Robeson v. Central R. Co. of New Jersey*, 76 Hun (N. Y.) 444, 28 N. Y. Supp. 104; *Griesa v. Massachusetts Ben. Ass'n*, 60 Hun (N. Y.) 581, 15 N. Y. Supp. 71, aff'd 133 N. Y. 619, 30 N. E. 1146; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 32 Hun (N. Y.) 190, aff'd 96 N. Y. 668; *Coffin v. Chicago N. P. Const. Co.*, 4 Hun (N. Y.) 625; *Connecticut Mut. Life Ins. Co. v. Cleveland, C. & C. R. Co.*, 41 Barb. (N. Y.) 9; *Spencer v. Rogers Locomotive & Machine Works*,

to those causes arising out of business done by the agent in question

21 N. Y. Super. Ct. 612; *Robertson v. National Steamship Co.*, 14 N. Y. Supp. 313, rev'd 17 N. Y. Supp. 459.

See, for contracts held to be made within the state, *O'Brien v. Peoria Water Co.*, 5 N. Y. App. Div. 229, 39 N. Y. Supp. 121; *Robeson v. Central R. Co. of New Jersey*, 76 Hun (N. Y.) 444, 28 N. Y. Supp. 104; *Kline Bros. & Co. v. North Coast Fire Ins. Co.*, 80 Wash. 609, 142 Pac. 7, construing N. Y. Code Civ. Proc. § 1780.

See, for causes of action held to arise outside of the state limits, *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 N. Y. Misc. 230, 33 N. Y. Supp. 1081; *Perry v. Erie Transfer Co.*, 4 N. Y. Misc. 598, 23 N. Y. Supp. 878, aff'g 1 N. Y. Misc. 208, 20 N. Y. Supp. 891; *Campbell v. Champlain & St. L. R. R.*, 18 How. Pr. (N. Y.) 412; *Cantwell v. Dubuque Western R. Co.*, 17 How. Pr. (N. Y.) 16; *Atlantic & P. Tel. Co. v. Baltimore & O. R. Co.*, 46 N. Y. Super. Ct. 377, modified 87 N. Y. 355.

See, for right of resident of the state to sue foreign corporation for personal injuries inflicted in another state, *Flynn v. Central R. Co. of New Jersey*, 27 Abb. N. Cas. (N. Y.) 31, 2 N. Y. Misc. 508, 22 N. Y. Supp. 383.

See, for actions by one foreign corporation against another foreign corporation under such statute, *United States Asphalt Refining Co. v. Comptoir National D'Escompte de Paris*, 166 N. Y. App. Div. 64, 151 N. Y. Supp. 604; *Progressive Power Co. v. Wrought Iron Bridge Co.*, 14 N. Y. Misc. 23, 35 N. Y. Supp. 130.

See, for actions held to affect title to real property situated without the state, *Hann v. Barnegat & Long Beach Improvement Co.*, 7 Civ. Proc. R. (N. Y.) 222.

See, for action to compel specific performance of contract to convey real property situate without the state, *Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 65 N. Y. Misc. 332, 119 N. Y. Supp. 639. See also *Armour v. South Shore Front Improvement Co.*, 71 N. Y. Misc. 253, 128 N. Y. Supp. 331, aff'd 144 N. Y. App. Div. 928, 129 N. Y. Supp. 1112.

For other New York cases involving jurisdiction suits against foreign corporations, see *Miller v. Jones*, 67 Hun (N. Y.) 281, 22 N. Y. Supp. 86; *Tuchband v. Chicago & A. R. Co.*, 53 Hun (N. Y.) 629, 5 N. Y. Supp. 493; *Barnes v. Mobile & N. W. R. Co.*, 12 Hun (N. Y.) 126; *Globe Yarn Mills v. Bilbrough*, 2 N. Y. Misc. 100, 21 N. Y. Supp. 2, aff'g 28 Abb. N. Cas. 426; *People v. Central R. of New Jersey*, 48 Barb. (N. Y.) 478, rev'd 42 N. Y. 283; *Ahern v. National Steamship Co.*, 39 How. Pr. (N. Y.) 403, 3 Daly 399; *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. (N. Y.) 1.

For other cases construing New York statute, see § 2959, supra.

It is to be noted, however, that Laws 1913, c. 60, amending Code Civ. Proc. § 1780, and providing that a foreign corporation doing business within the state may be sued for any cause of action, have rendered these decisions obsolete. *Rubel v. Central R. of New Jersey*, 171 N. Y. App. Div. 456, 156 N. Y. Supp. 1094. See *Smolik v. Philadelphia & R. Coal & Iron Co.*, 222 Fed. 148, holding that under N. Y. Code Civ. Proc. §§ 432, 1780, and N. Y. Gen. Corp. Law, § 16, service upon an agent designated by the foreign corporation is sufficient to confer jurisdiction over the corporation, even though the cause of action involved in the suit did not arise in the state. But under N. Y. Code Civ. Proc. § 1780, subd. 4, as amended by

or within the state unless their terms and context require it.⁶⁶ Thus in the specific instance of insurance companies the jurisdiction was held not to be limited to actions on policies.⁶⁷ But under a statute limiting jurisdiction to "any action or suit pertaining to the property, business or transactions of a foreign corporation within this state," no jurisdiction by service on the agent is gained unless the action pertains to the described objects.⁶⁸

With respect to causes of action arising on boundary rivers against foreign corporations, not only the state boundary, but also the limits of the jurisdiction of the state must be consulted.⁶⁹ Statutes by describing particular causes of action or relief which may be sued for, e. g., contracts broken within the state, impliedly deny jurisdiction of other causes or forms of relief. Thus formerly in New York, under the statute heretofore mentioned prior to its amendment, a cause of action *ex delicto* arising in another state against a foreign corporation could be maintained only by a resident or a domestic corporation,⁷⁰ which, however, is now modified by an amendment permitting it if the corporation is "doing business within the state," as has been noted heretofore.⁷¹

As has been seen elsewhere, the courts of a state have no visitorial

Laws N. Y. 1913, c. 60, a foreign corporation not doing business in the state cannot be sued by a foreign corporation doing business in the state. *United States Asphalt Refining Co. v. Comptoir National D'Escompte de Paris*, 166 N. Y. App. Div. 64, 151 N. Y. Supp. 604.

In North Carolina a statute authorizes an action against a foreign corporation by a plaintiff not a resident of the state when the cause of action shall have arisen in the state. *Bryan v. Western U. Tel. Co.*, 133 N. C. 603, 45 S. E. 938.

See for cause of action held to have arisen in the state within the meaning of Rev. Stat. N. C. 1905, § 440, *McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832.

⁶⁶ *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687; *Olson v. Buffalo Hump Min. Co.* 130 Fed. 1017.

⁶⁷ *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687.

⁶⁸ *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017.

⁶⁹ See § 2959, *supra*, and *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527.

⁷⁰ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Fairelough v. Southern Pac. Co.*, 171 N. Y. App. Div. 496, 157 N. Y. Supp. 862, *rev'g* 155 N. Y. Supp. 899; *English v. New York, N. H. & H. R. Co.*, 161 N. Y. App. Div. 831, 146 N. Y. Supp. 963; *Klunck v. Pennsylvania R. Co.*, 148 N. Y. App. Div. 786, 133 N. Y. Supp. 207. These decisions were made obsolete by Laws N. Y. 1913, c. 60.

⁷¹ Laws N. Y. 1913, c. 60, adding subd. 4 to N. Y. Code Civ. Proc. § 1780. See also *Rubel v. Central R. of New Jersey*, 171 N. Y. App. Div. 456, 156 N. Y. Supp. 1094.

powers over foreign corporations, and cannot regulate or interfere with their internal affairs and management. Such power belongs exclusively to the state or country by which the corporation was created. But they have jurisdiction to enforce individual rights of a corporation, where the enforcement thereof does not involve any regulation of or interference with internal affairs.⁷² Ordinarily the courts of a state will not entertain jurisdiction of actions involving the internal management of foreign corporations, even where, under a statute, consent has been filed to service "as valid as if served according to the laws of the state."⁷³ There is an inherent lack of power to make remedial process operate in another state, though this is a lack of judicial power rather than a lack of jurisdiction.⁷⁴ Thus a decree operating in personam cannot operate on corporations in a foreign state.⁷⁵ Mandamus to a corporation must be limited to such acts as can be compelled within the state.⁷⁶

§ 6009. Jurisdiction—Federal courts. The jurisdiction of the federal courts in actions by and against corporations generally has been considered in a prior portion of this work.⁷⁷

The object of the provisions of the Constitution and statutes of the United States in conferring upon the federal courts jurisdiction of controversies between citizens of different states of the Union or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one

⁷² See §§ 2960, 5786-5807, *supra*.

⁷³ See § 2960, *supra*. See also *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 45 L. R. A. 621, 33 S. E. 385.

⁷⁴ See *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781; *Reynolds & Hamby Estate Mortg. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Sauerbrunn v. Hartford Life Ins. Co.*, 159 N. Y. App. Div. 121, 143 N. Y. Supp. 1009; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185. See also § § 2990, 5786, 5787, *supra*.

⁷⁵ *Reynolds & Hamby Estate Mortg. Co.*, 116 Ga. 495, 42 S. E. 796; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185. See § § 2960, 5786 et seq., *supra*.

⁷⁶ *Hobbs v. Tom Reed Gold Min.*

Co., 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781. See § § 2960, 3287-3289, *supra*.

Mandamus will be against the Union Pacific Railroad Company in the District of Iowa concerning the tracks operated in that state under an Act of Congress. *United States v. Union Pac. R. Co.*, 3 Dill. 524, Fed. Cas. No. 16,600.

For actions against national banks and other national corporations, see § 2961.

For actions against interstate corporations, see § § 2962, 2964, 5707-5717, *supra*.

For actions against domesticated corporations, see § § 2962, 2964, 5707-5717, *supra*.

⁷⁷ See § § 2965-2967, 2970-2976, 2979.

of the litigants resides, and the jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state.⁷⁸ Thus statutes requiring foreign corporations, as a condition of being permitted to do business in the state, to stipulate not to remove into federal courts suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void.⁷⁹

The right to take jurisdiction of a foreign corporation as one of the parties is an undoubted consequence of the doctrine finally settled that a corporation is a "citizen" of the state by which it was created, and the only question is whether it is present in the state which contains the federal district so that it can there be served when it does not voluntarily appear.⁸⁰ It is immaterial that the state courts could not have jurisdiction because one of the corporations was foreign to it and to the federal district, since the state practice is not followed in determining jurisdictional matters.⁸¹

It is held by the Supreme Court of the United States that, as the jurisdiction conferred by the Constitution and statutes of the United States upon the federal courts cannot be abridged or impaired by any statute of a state, the fact that the legislature of a state has not seen fit to authorize suits against foreign corporations to be brought in its own courts by citizens and residents of other states cannot deprive such citizens of their right to invoke the jurisdiction of the federal courts under the Constitution and laws of the United States.⁸²

On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one state, brought in a court of the United States held

⁷⁸ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819; *Hyde v. Stone*, 20 How. (U. S.) 170, 15 L. Ed. 874.

⁷⁹ See §§ 5761, 5913, *supra*. See also *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445, 22 L. Ed. 365.

⁸⁰ See §§ 390 *et seq.*, 2957, 2965, *supra*.

⁸¹ See *Noel Const. Co. of Baltimore City v. George W. Smith & Co. Inc.*, 193 Fed. 492. See also § 2965, *supra*.

In *United States v. American Bell Tel. Co.*, 29 Fed. 17, it was questioned whether a foreign corporation could be sued in a federal court where the same suit could not have been maintained against it in the state court for want of jurisdiction. A later decision questions this ruling on the authority of *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, in which it was pointed out that the federal courts did not conform to state laws and decisions in jurisdictional matters. See *Noel Const. Co. of Baltimore City v. George W. Smith & Co. Inc.*, 193 Fed. 492.

⁸² *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

within another state, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employees found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the state.⁸⁴

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.⁸⁵ Thus an action may be maintained in any federal court held within a state which acquires jurisdiction of the defendant by a citizen and resident of another state against a foreign corporation doing business in the former state for a personal tort committed abroad, if it was such as would have been actionable in the former state or elsewhere in the United States.⁸⁶

There can be but two conditions in which a federal court can obtain jurisdiction of a foreign corporation on the ground of diversity of citizenship: The one by voluntary appearance, and the other, if the corporation is doing business in the state where the court is held, by service of process upon some officer or agent in that state appointed to there transact and manage its business, and representing the corporation in such state. Service upon an agent of a foreign corporation is not service upon the corporation unless it be engaged in business in the state where such agent is served and he be appointed to act for it there.⁸⁷ A federal court has no jurisdiction over a foreign corporation which has no regular or established place of business or agent in the district where the suit is brought, and service of process upon a person who does not in any way represent it confers no jurisdiction on the court, which should on motion set aside the service and dismiss the bill for want of jurisdiction.⁸⁸

⁸⁴ *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. See also § 6019 et seq., *infra*.

⁸⁵ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

⁸⁶ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. Ed. 537; *Huntington v.*

Attrill, 146 U. S. 657, 36 L. Ed. 1123; *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. Ed. 439; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65, 20 L. Ed. 354.

⁸⁷ *Central Grain & Stock Exchange v. Board of Trade*, 125 Fed. 463.

See § 6021, *infra*.

⁸⁸ *Westinghouse Mach. Co. v. Press Pub. Co.*, 110 Fed. 254; *Eldred v. American Palace Car Co.*, 105 Fed. 455; *Mecke v. Valleytown Mineral Co.*, 93 Fed. 697. See § 6021, *infra*.

A foreign corporation, by filing a petition for the removal of a suit brought against it in a state court to the federal court, does not waive defects in the service of the summons, and objection can be made to such service in the federal court in the same manner as if the action had been originally commenced there.⁸⁹ A special appearance of a foreign corporation defendant in an action brought against it in a state court, for the single purpose of insisting that no valid service had been made upon it, that it had actually stopped doing business in such state, had removed its property therefrom, and revoked the designation of its agent under the statute prior to such service, is not a waiver of its right to remove the cause to the federal court or a submission to the claimed jurisdiction.⁹⁰

As has been stated heretofore, it is a settled rule that no jurisdiction which it could not exercise by law can be conferred on or exercised by a federal court because the parties consent to it or one of them waives objection. At any stage of the case the court will and should raise the question of its own motion, and even on appeal or error will inquire of its own or the trial court's jurisdiction, if federal, and will not retain the case if it is found lacking.⁹¹

§ 6010. — Inferior and special courts. The jurisdiction of inferior courts or courts of special jurisdiction over corporations has been considered in another portion of this work, and as has been there stated it is impossible to essay any analysis of all existing statutes on their jurisdiction over corporate parties. The statutes of the particular state affecting the particular court must be consulted.⁹² The jurisdiction of such inferior tribunals therefore extends to foreign corporations,⁹³ of every kind not necessarily excluded in language or by the

⁸⁹ *Conley v. Mathieson Alkali Works*, 190 U. S. 405, 47 L. Ed. 1113, *aff'g* 110 Fed. 730; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. Ed. 431; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517. See also *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, 61 L. Ed. 987; *Toledo Railways & Light Co. v. Hill*, 244 U. S. 49, 61 L. Ed. 982.

⁹⁰ *Lathrop-Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 150 Fed. 666.

⁹¹ See § 2965, *supra*. See also *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521; *Minnesota v.*

Northern Securities Co., 194 U. S. 48, 48 L. Ed. 870; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462.

⁹² See § 2968, *supra*. See also *Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

⁹³ *Michigan*. *McLean v. Prudential Ins. Co.*, 130 Mich. 591, 90 N. W. 405; *Gallagher v. American Exp. Co.*, 56 Mich. 13, 22 N. W. 96.

Missouri. *Rechnitzer v. Missouri, K. & T. Ry. Co.*, 60 Mo. App. 409.

New Jersey. *Wheeler & Wilson Mfg. Co. v. Carty*, 53 N. J. L. 336, 21 Ark. 851. See also *Delaware, L. & W.*

nature of the tribunal,⁹⁴ and not impliedly excluded by want of any legal means of obtaining jurisdiction.⁹⁵ The typical inferior tribunal is that of the justice of the peace, and while formerly his jurisdiction over corporations was denied, this doctrine has now waned, and, generally speaking, the constitutional or statutory jurisdiction of justices of the peace includes actions by or against corporations, provided the limits in amount and subject-matter or in the nature of the action are not exceeded, and by the better and modern rule mere want of defined

R. Co. v. Ditton, 36 N. J. L. 361.

North Carolina. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 S. E. 793.

South Carolina. Dennis v. Atlantic Coast Line R. R., 86 S. C. 258, 68 S. E. 465.

⁹⁴ McLean v. Prudential Ins. Co., 130 Mich. 591, 90 N. W. 405.

⁹⁵ Wheeler & Wilson Mfg. Co. v. Carty, 53 N. J. L. 336, 21 Ark. 851. See also Delaware, L. & W. R. Co. v. Ditton, 36 N. J. L. 361.

By How. Mich. St. § 3723, jurisdiction over foreign corporations was conferred, though prior to 1881 justices of the peace had it only in attachment and garnishee cases. Gallagher v. American Exp. Co., 56 Mich. 13, 22 N. W. 96.

In the earlier Michigan cases jurisdiction over foreign corporations was denied because of lack of any way to obtain jurisdiction in such courts, the modes of process being inapplicable to such courts. American Exp. Co. v. Conant, 45 Mich. 642, 8 N. W. 574; Hebel v. Amazon Ins. Co., 33 Mich. 400; Hartford Fire Ins. Co. v. Owen, 30 Mich. 441; Brigham v. Eglinton, 7 Mich. 291.

By statute in North Carolina, process can run outside the county to a foreign corporation, but not under all circumstances to natural persons. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 S. E. 793.

A penal action can be brought in any county where the foreign cor-

poration does business or has property. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 S. E. 793.

The jurisdiction of a magistrate of actions for injury to person or property up to one hundred dollars includes corporations both domestic and foreign. Dennis v. Atlantic Coast Line R. R., 86 S. C. 258, 68 S. E. 465.

For jurisdiction of the Municipal Court of New York over foreign corporations, see Worthington v. London Guarantee & Accident Co., 164 N. Y. 81, 58 N. E. 102; Degnon v. Cook & Wilson's Greatest Wild Animal Circus on Earth, 98 N. Y. Misc. 251, 162 N. Y. Supp. 1051. See also note 78 to § 2698, *supra*.

For jurisdiction of City Court of New York, over foreign corporations, see Susquehanna Woolen Co. v. Imperial Coal & Coke Co., 66 N. Y. Misc. 621, 122 N. Y. Supp. 214; Kline v. Imperial Coal & Coke Co., 66 N. Y. Misc. 616, 122 N. Y. Supp. 211; Maas v. Cunard S. S. Co., 19 N. Y. Misc. 100, 43 N. Y. Supp. 219. See also note 84 to § 2968, *supra*.

For jurisdiction of Municipal Court of Boston over foreign corporations, see Potter v. Lapointe Mach. Tool Co., 201 Mass. 557, 88 N. E. 418.

For jurisdiction of City Court of Topeka, see H. Parker Grain Co. v. Chicago, R. I. & P. Ry. Co., 70 Kan. 168, 78 Pac. 406; Robinson v. Missouri Pac. R. Co., 67 Kan. 278, 72 Pac. 854.

practice or process, or the necessity of adaptations of practice, afford no conclusive reason for a construction which denies such jurisdiction.⁹⁶

There may be jurisdiction of garnishment proceedings even though there is none on original process.⁹⁷ A jurisdiction over foreign corporations by attachment from the court of a justice is not, conversely, applicable to domestic corporations.⁹⁸

Inferior or limited courts in some instances have jurisdiction dependent on the corporation's "doing business" or having an "office," within the county, city, district, or residing there, or because the cause of action is localized or arose there.⁹⁹ Thus the New York Municipal Court has no jurisdiction over foreign corporations which do not have an office in the city.¹

The service in actions in an inferior court against a foreign corporation must be strictly according to the statutory method in all substantial matters, and every other prerequisite must exist.²

§ 6011. — Acquiring by consent of corporation. If a court has jurisdiction of the subject-matter, a foreign corporation may expressly agree, in a contract entered into by it, that such court shall have jurisdiction of the corporation in an action for a breach of such contract brought in such court against such corporation.³ A corporation, also, may expressly authorize an officer or agent to accept or receive service of process in other states, or it may do so impliedly by doing business in another state under the authority of a statute providing for service of process upon agents of foreign corporations doing busi-

⁹⁶ See § 2968, *supra*.

⁹⁷ *Smith v. Durbridge*, 26 La. Ann. 531. See § 2968, *supra*.

⁹⁸ *Boley v. Ohio Life Insurance & Trust Co.*, 12 Ohio St. 139, holding that "foreign corporation" in attachment statute excludes all domestic corporations of the state.

⁹⁹ See § 2968, *supra*.

¹ *Sommese v. Florence Distilling Co.*, 56 N. Y. Misc. 670, 107 N. Y. Supp. 630; *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488.

² See § 3079, *supra*, *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289; *American Exp. Co. v. Conant*, 45 Mich. 642, 8 N. W. 574; *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290.

See also §§ 2968, 2989, *supra*, and § 6029, *infra*.

In a justice's court no jurisdiction is had over a foreign corporation by service upon its agent. The statute (§ 1624, 1 Comp. L.) is exclusive. *American Exp. Co. v. Conant*, 45 Mich. 642, 8 N. W. 574.

A justice's process can only be served according to the statute applying to justices of the peace. *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290.

³ *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 Fed. 453, 61 L. R. A. 717, *aff'd* 190 U. S. 147, 47 L. Ed. 987.

ness therein. Such statutes have been adopted in most jurisdictions, if not in all. When a foreign corporation accepts the benefit of such a statute by allowing its agents to do business in a state, it impliedly agrees to its terms and will be bound by service of process upon its agent in accordance with the statute.⁴ In a leading case, Justice Field

4 United States. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 L. Ed. 987, aff'g 112 Fed. 453, 61 L. R. A. 717; Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Hill v. Empire State-Idaho Mining & Developing Co., 156 Fed. 797; Davis v. Kansas & T. Coal Co., 129 Fed. 149; Equitable Life Assur. Soc. of United States v. Fowler, 125 Fed. 88; Swann v. Mutual Reserve Fund Life Ass'n, 100 Fed. 922; Sparks v. National Masonic Acc. Ass'n, 73 Fed. 277; Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co., 55 Fed. 27; Van Dresser v. Oregon Ry. & Nav. Co., 48 Fed. 202; Knapp, Stout & Company v. National Mut. Fire Ins. Co., 30 Fed. 607; Lung Chung v. Northern Pac. Ry. Co., 19 Fed. 254; Ehrman v. Teutonia Ins. Co., 1 Fed. 471; Hayden v. Androscoggin Mills, 1 Fed. 93.

Alabama. Lewis v. International Ins. Co., 73 So. 629; Equitable Life Assur. Society v. Vogel, 76 Ala. 441, 52 Am. Rep. 344; Western U. Tel. Co. v. Pleasants, 46 Ala. 641.

Arkansas. American Casualty Co. v. Lea, 56 Ark. 539, 20 S. W. 416.

California. Lawrence v. Ballou, 50 Cal. 258.

Colorado. Colorado Iron-Works v. Sierra Grande Min. Co., 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325.

District of Columbia. Weymouth v. Washington, G. & A. R. Co., 1 MacArthur 19.

Georgia. Reeves v. Southern Ry.

Co., 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; Watson v. Richmond & D. R. Co., 91 Ga. 222, 18 S. E. 306; City Fire Ins. Co. v. Carrugi, 41 Ga. 660.

Massachusetts. Reyer v. Odd Fellows' Fraternal Acc. Ass'n of America, 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. E. 469; Wilson v. Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318.

Michigan. Emerson, etc. v. McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182.

Missouri. McNichol v. United States Mercantile Reporting Agency, 74 Mo. 457; Farnsworth v. Terre Haute, A. & St. L. R. Co., 29 Mo. 75.

Nebraska. Fremont, E. & M. V. I. Co. v. New York, C. & St. L. R. Co., 66 Neb. 159, 59 L. R. A. 939, 92 N. W. 131; Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co., 49 Neb. 537, 68 N. W. 929; Klopp v. Creston City Guarantee Waterworks Co., 34 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819.

New Jersey. Capen v. Pacific Mut. Ins. Co., 25 N. J. L. 67, 44 Am. Dec. 412; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57.

New York. Gibbs v. Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513; People v. Knickerbocker Trust Co., 38 Misc. 446, 77 N. Y. Supp. 1000.

North Carolina. Clinard v. White, 129 N. C. 250, 39 S. E. 960; Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

Pennsylvania. Werron v. Metropolitan Life Ins. Co., 166 Pa. St. 112, 30 Atl. 1008; Kennedy v. Agricultural

said: "A state may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process."⁵ Accordingly, a foreign corporation coming into another state, by its officers or agents, and there engaging in business, thereby subjects itself to the process of the courts of that state.⁶ Coming into the state to do business there implies a consent and submission to the jurisdiction thereof and to the local methods of process and service.⁷ And where a foreign corporation has so far complied with the law of a state, imposing conditions upon which it may do business therein, as to establish an office in the state and designate an agent therein upon whom process may be served, service of process upon such agent vests the¹ court issuing the same with jurisdiction to hear and determine the cause, irrespective of the citizenship of the plaintiff, or the subject-matter of the controversy.⁸

In the case of a foreign corporation as in that of a nonresident natural person "the court has general jurisdiction of the person, so

Ins. Co., 165 Pa. St. 179, 30 Atl. 724; Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 173.

Tennessee. Chicago & A. R. Co. v. Walker, 9 Lea 475.

Vermont. Osborne & Woodbury v. Shawmut Ins. Co., 51 Vt. 278; Day v. Essex County Bank, 13 Vt. 97.

Virginia. Baltimore & O. R. Co. v. Gallahue's Adm'r, 12 Gratt. 655, 65 Am. Dec. 254.

Wisconsin. State v. United States Mut. Acc. Ass'n, 67 Wis. 624, 31 N. W. 229.

See also discussion in § 2957, supra.

⁵ St. Clair v. Cox, 106 U. S. 350, 356, 27 L. Ed. 222.

⁶ McCormick v. Southern Exp. Co., 81 W. Va. 87, 93 S. E. 1048.

It is held that a trading corporation is personally present and is of right suable in any country in which it has an established place of business. Hayden v. Androscoggin Mills, 1 Fed. 93 following Newby v. Von Oppen, L. R. 7 Q. B. 293. See State v. North American Land & Timber Co., 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

⁷ Shields v. Union Cent. Life Ins. Co., 119 N. C. 380, 25 S. E. 951.

⁸ State v. North American Land & Timber Co., 106 La. 621, 87 Am. St. Rep. 309, 31 So. 172.

that the want of service of process may be waived."⁹ No jurisdiction can, however, be conferred upon or exercised by a federal court because the parties consent to it or one of them waives objection. The court will and should raise the question of its own motion at any stage of the proceeding, and even on error or appeal will inquire as to its own or the trial court's jurisdiction, if federal, and will not retain the case, if it is found lacking.¹⁰

§ 6012. Effect of appearance. An appearance in a suit is a coming into court as a party to a suit or action. An appearance is either general or special. By a general appearance a defendant appears for all purposes in the suit; by a special appearance, he appears solely for the purpose of objecting to the jurisdiction on account of a defect, omission or irregularity in the service of summons upon him, or perhaps for some other reason.¹¹

Where a foreign corporation appears generally in an action against it, it waives all objection to the jurisdiction of the court, and it is as much subject to the jurisdiction of the court as if it were a domestic corporation, if the court has jurisdiction of a suit of the character involved against a foreign corporation,¹² and if the appearance is by

⁹ *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

¹⁰ *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, 55 L. Ed. 521; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. Ed. 462. See §§ 2695, 6009, *supra*.

¹¹ See §§ 2977, 3018, *supra*.

¹² *United States. St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Tioga R. R. v. Blossburg & C. R. R.*, 20 Wall. 137, 22 L. Ed. 331; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Blue Goose Min. Co. v. Northern Light Min. Co.*, 245 Fed. 727; *Twin Lakes Land & Water Co. v. Dohner*, 242 Fed. 399; *Lively v. Pieton*, 218 Fed. 401.

Arizona. Fleming v. Black Warrior Copper Co., *Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

California. California Pine Box & Lumber Co. v. Mogan, 13 Cal. App. 65, 108 Pac. 882.

District of Columbia. Howard v. Chesapeake & O. R. Co., 11 App. Cas. 300. See *Doremus v. National Cotton Improvement Co.*, 39 App. Cas. 295.

Kansas. North Missouri R. Co. v. Akers, 4 Kan. 453, 96 Am. Dec. 183.

Massachusetts. Pierce v. Equitable Assur. Society, 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858.

Michigan. National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co., 168 Mich. 195, 131 N. W. 580.

Minnesota. Banks v. Pennsylvania R. Co., 111 Minn. 48, 126 N. W. 410.

Mississippi. See Columbia Star Milling Co. v. Brand, 115 Miss. 625, 76 So. 557; *Vicksburg, S. & P. R. Co. v. Forcheimer*, 113 Miss. 531, 74 So. 418.

Nevada. Golden v. Murphy, 31 Nev. 395, 105 Pac. 99, 103 Pac. 394.

New Hampshire. March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732.

New Jersey. Albert v. Clarendon Land Investment & Agency Co., 53 N. J. Eq. 623, 23 Atl. 8.

one having authority to appear for the corporation.¹³ Where a for-

New Mexico. Alliance Assur. Co. v. Bartlett, 9 N. M. 554, 58 Pac. 351.

New York. McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Brooks v. New York & G. L. R. Co., 30 Hun 47; Root v. Great Western R. Co., 65 Barb. 619, aff'd 55 N. Y. 636; Dart v. Farmers' Bank, 27 Barb. 337; Cook v. Champlain Transp. Co., 1 Denio 91; De Bemer v. Drew, 39 How. Pr. 466. See also Rockwell v. Knights Templars & Masonic Mut. Aid Ass'n, 134 App. Div. 736, 119 N. Y. Supp. 515.

Oregon. Multnomah Lumber Co. v. Weston Basket Co., 54 Ore. 22, 99 Pac. 1046, 102 Pac. 1.

Tennessee. New River Lumber Co. v. Tennessee R. Co., 136 Tenn. 661, 191 S. W. 334.

Texas. Atchison, T. & S. F. R. Co. v. Ayers, — Tex. Civ. App. —, 192 S. W. 310; Atchison, T. & S. F. Ry. Co. v. Stevens, — Tex. Civ. App. —, 192 S. W. 304; Banco Minero v. Ross & Masterson, — Tex. Civ. App. —, 138 S. W. 224; Western U. Tel. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708; Mexican Cent. Ry. Co. v. Charman (Tex. Civ. App.), 24 S. W. 958; St. Louis, A. & T. Ry. Co. v. Whitley, 77 Tex. 126, 13 S. W. 853; Piedmont & A. Life Ins. Co. v. Fitzgerald, 1 White & W. Civ. Cas. Ct. App. § 1346.

Wisconsin. Congar v. Galena & C. U. R. Co., 17 Wis. 477.

See §§ 2957, 2977, 3018, 3019, supra.

In *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331, the court said: "We assume, also, that a foreign corporation may appoint an attorney to appear for it when sued in a foreign state, and that a judgment may be obtained against it, upon such appearance. We are not aware that this proposition has ever been doubted. *McGoon v. Scales*, 9 Wall. (U. S.) 31; *Chaffee v.*

Hayward, 20 How. (U. S.) 208." See also *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

In a suit against a foreign corporation to rescind a contract for the sale of land, plaintiff, at the time of filing the bill of complaint and serving the subpoena, served notice of motion for preliminary injunction to prevent the sale of the contract, and defendant appeared on the motion, which was denied. Thereafter defendant entered a special appearance and filed a motion to quash the service on the ground of deception in obtaining service not ascertained by it until after the hearing on the injunction, which motion being denied on the ground that defendant had waived objection to the service by its appearance on the motion for injunction, defendant further appeared specially and made a motion for leave to withdraw the appearance entered on the motion for injunction on the ground that when it was entered defendant had not learned, and had no opportunity to learn, of the deceit in the service in the main proceeding. It was held that refusal of leave to withdraw the appearance was not an abuse of discretion. *Twin Lakes Land & Water Co. v. Dohner*, 242 Fed. 399.

As to the effect of a special appearance to move to set aside an attachment against a foreign corporation, see *Lowe v. Swinehart Tire & Rubber Co.*, 211 Fed. 165.

¹³ The officers and attorneys of an insolvent corporation, who had been enjoined from exercising any of its powers and franchises, and from using its name for any purpose whatsoever, by a court of the state by which the corporation was created, and which had jurisdiction of the corporation

eign corporation appears and answers on the merits in an action against it, it cannot in such answer reserve a question of jurisdiction based on the invalidity of the service of process upon it.¹⁴ A foreign corporation, which after the court has overruled the suggestion of the person who was served with process in the action that he was not its agent and therefore the service was ineffectual to bring it into court, appears and asserts its right to a change of venue to another county, and afterwards answers generally, has made a general appearance.¹⁵ A voluntary appearance by a foreign corporation, just as by natural nonresident persons, will enable the court to exert such adjudicative power as it possesses over the subject-matter and the cause of action.¹⁶ And where a foreign corporation voluntarily appears in an action against it, it is immaterial whether or not it was engaged in business in the state or had property therein, or had complied with the state statute requiring the corporation to designate an agent in the state upon whom service of process might be had.¹⁷ Appearance in the cause by a foreign corporation, even though such appearance is expressly declared to be limited to the sole purpose of presenting

and of its property, and which had appointed a receiver of the corporation, and a trustee for its creditors and stockholders, cannot enter its appearance in an action against it in another state, or so act on its behalf that a judgment may be obtained against it by confession or default or otherwise. *Rust v. United Waterworks Co., Ltd.*, 70 Fed. 129.

Where a foreign corporation was sued, and certain parties appeared and pleaded in the name of the corporation, after which the court allowed an amendment making such persons defendants as partners, it was held that their appearance and pleading to the action could not be held, as against the corporation, an appearance after the amendment. *Inman v. Allport*, 65 Ill. 540.

¹⁴ *Golden v. Murphy*, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99.

¹⁵ *Atchison, T. & S. F. Ry. Co. v. Ayers*, — Tex. Civ. App. —, 192 S. W. 310; *Atchison, T. & S. F. Ry. Co. v. Stevens*, — Tex. Civ. App. —, 192 S. W. 304.

In Tennessee, where a defendant foreign corporation moved to dismiss the bill of complaint, and in the alternative demurred, and it was agreed between the parties that if the motion should be sustained, the demurrer should not be considered an entry of appearance, it was held that the motion having been disallowed, the defendant must be treated as having made its appearance in court by filing the demurrer. *Brewer v. De Camp Glass Casket Co.*, 139 Tenn. 97, 201 S. W. 145.

¹⁶ *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Banco Minero v. Ross & Masterson*, — Tex. Civ. App. —, 138 S. W. 224. See also *Twin Lakes Land & Water Co. v. Dohner*, 242 Fed. 399; *Banks v. Pennsylvania R. Co.*, 111 Minn. 48, 126 N. W. 410; *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 99 Pac. 1046, 102 Pac. 1.

¹⁷ *Blue Goose Min. Co. v. Northern Light Min. Co.*, 245 Fed. 727.

a plea to the jurisdiction of the court over the corporation, is a waiver of its immunity from the jurisdiction of the court, where the court has jurisdiction of the subject-matter.¹⁸ But where the jurisdiction of the court over actions against foreign corporations is limited to a certain class of actions, the appearance by a foreign corporation in an action not embraced within the class of actions over which the court has jurisdiction, will not confer upon the court jurisdiction of the action.¹⁹

A foreign corporation does not submit itself to the jurisdiction of a state by making a special appearance in one of its courts for the purpose of making claim that no valid service was made upon it.²⁰ Thus it was held that where a statute provided that in case of the death or removal of the designated agent of a foreign corporation doing business in the state and a failure to appoint another, service of process might be made upon the secretary of state, the special appearance of a foreign corporation in the courts of such state for the single purpose of insisting that it had actually stopped doing business in such state, had removed its property therefrom and revoked the designation of its agent under the statute prior to the service of process upon the secretary of state, was not a waiver of its right or a submission to the claimed jurisdiction.²¹ The appearance

¹⁸ *St. Louis, A. & T. Ry. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853; *Western U. Tel. Co. v. Russell*, 12 Tex. Civ. App. 82, 33 S. W. 708; *Mexican Cent. Ry. Co. v. Charman* (Tex. Civ. App.), 24 S. W. 958. See also *Brooks v. New York & G. L. R. Co.*, 30 Hun (N. Y.) 47; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140; *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91.

Where an agent of a foreign corporation on whom process can be served enters an appearance for such defendant corporation, after the period of over three years has elapsed without objection being made to such appearance, it is too late for the corporation to withdraw such appearance, unless it is shown that it had no knowledge of such appearance. *Alliance Assur. Co. v. Bartlett*, 9 N. M. 554, 58 Pac. 351.

When an insolvent foreign corporation is proceeded against under sec-

tions 70, 72 of the Corporation Act of New Jersey, it cannot raise the question whether the court can acquire jurisdiction over a foreign corporation by notice pursuant to an order of publication, so as to pronounce a valid decree adjudging it to be insolvent, and thereafter proceed to undertake distribution of its assets, when it has made a motion to dismiss the bill for want of equity pursuant to the rules of procedure, such motion being equivalent to a demurrer, and constituting an appearance to the suit for all purposes. *Albert v. Clarendon Land, Investment & Agency Co.*, 53 N. J. Eq. 623, 23 Atl. 8.

¹⁹ *Harriott v. New Jersey R. Co.*, 8 Abb. Pr. (N. Y.) 284; *Seiser Bros. Co. v. Potter Produce Co.*, 23 Civ. Proc. (N. Y.) 348.

²⁰ *Lathrop-Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 150 Fed. 666.

²¹ *Lathrop-Shea & Henwood Co. v.*

of its regular attorney as *amicus curiae* to object to sufficiency of service of citation on it has been held not an appearance of a foreign corporation.²² Nor does the fact that the attorney for the president and principal stockholder of the corporation, who was joined as defendant with it, suggested or argued to the court that the corporation was not properly in court constitute the entry of an appearance for the corporation.²³ It is held in a federal court that a foreign corporation not appearing generally in an action brought against it, but only for the purpose of moving to set aside the service of the summons and to stay all proceedings, on the ground that for some time prior to the service of the summons it had ceased to do business in the state and had no property within the jurisdiction of the court, and consequently could not be found there for the purposes of service, does not waive the objection, and is entitled to an order setting aside the service.²⁴ Nor does an appearance solely to remove the cause to the federal court waive the objection that the corporation was not well served and was not brought under the jurisdiction of the state court,²⁵ even though the petition was not expressly limited to a special appearance reserving objection to jurisdiction over the person.²⁶

Interior Construction & Improvement Co., 150 Fed. 666.

For proceedings by a foreign corporation held not to amount to a general appearance, see *American Surety Co. v. Bernstein*, 101 Tex. 189, 105 S. W. 990, rev'g 102 S. W. 181.

²² *Elliott v. Standard Steel Wheel & Tire Amor Co.*, — Tex. Civ. App. —, 173 S. W. 616. See also *Columbia Star Milling Co. v. Brand*, 115 Miss. 625, 76 So. 557.

²³ *Columbia Star Milling Co. v. Brand*, 115 Miss. 625, 76 So. 557.

²⁴ *De Castro v. Compagnie Française du Telegraphe, de Paris à New York*, 76 Fed. 425.

²⁵ *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 53 L. Ed. 782; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517 (where the petition expressly limited the appearance thereby made); *International Text-Book Co. v. Heartt*, 136 Fed. 129; *Collins v. American Spirit Mfg. Co.*, 96 Fed. 133.

²⁶ *Wabash Western Ry. Co. v. Brow*, 164 U. S. 271, 41 L. Ed. 431, rev'g 65

Fed. 941; *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367. See §§ 3018, 3019, *supra*.

It is held in New York that the federal doctrine is inapplicable when jurisdiction of the person is questioned in the state court after remand, and that the necessary averment that the action is "pending" admits jurisdiction. *Farmer v. National Life Ass'n of Hartford*, 138 N. Y. 265, 33 N. E. 1075, aff'g 67 Hun 119, 21 N. Y. Supp. 1056.

So where, after remand, the foreign corporation moved to open a default, service of process on the insurance superintendent after revocation was held to be waived. *Tierney v. Helvetia Swiss Fire Ins. Co.*, 138 N. Y. App. Div. 469, 122 N. Y. Supp. 869.

See *State v. Sale*, 232 Mo. 166, 132 S. W. 1119, where it was held that an appearance, though made specially to remove the case to the federal court waived a defect in the return of process.

It has been held that a foreign corporation puts itself under the jurisdiction by general appearance, even though it has already been dissolved in the state of its domicile.²⁷ After general appearance entered without reservation in the federal court to which the case was removed, no objection can be made that the action was beyond the jurisdiction of the state court.²⁸ Pleading to the merits after removal waives all objections to the original jurisdiction of the state court.²⁹ And a foreign corporation by pleading in its answer a demand in recoupment submits to the jurisdiction, and cannot attack the validity of the service on the ground that it was not doing business in the state at the time it was served with process, even though it saved its rights to object to defective jurisdiction before pleading to the merits.³⁰ A demurrer to a petition for a receiver and a motion to set aside the appointment made without limitation is a general voluntary appearance by a foreign corporation.³¹ Where a foreign corporation, immediately upon being served with process, appeared specially to object to the jurisdiction of the court over it on the ground that it had never transacted business within the state, that no one of its officers was at the time of the service within the state engaged in the transaction of business for it and that it had not been authorized or qualified to transact business within the state by the law of the state, and moved to quash the service of the writ upon the ground that the return of the marshal was untrue and insufficient in law, it was held that by appealing from an order overruling such motion to quash, the defendant did not waive the motion.³²

²⁷ *Frink v. National Mut. Fire Ins. Co.*, 90 S. C. 544, Ann. Cas. 1913 D 221, 74 S. E. 33. See §§ 5613-5617, *supra*.

²⁸ *Texas & P. R. Co. v. Bigger*, 239 U. S. 330, 60 L. Ed. 310; *Texas & P. R. Co. v. Hill*, 237 U. S. 208, 59 L. Ed. 918.

²⁹ *Texas & P. R. Co. v. Bigger*, 239 U. S. 330, 60 L. Ed. 310; *Texas & P. R. Co. v. Hill*, 237 U. S. 208, 59 L. Ed. 918.

³⁰ *Merchants Heat & Light Co. v. James B. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488. See also §§ 3018, 3125, *supra*.

³¹ *Liveley v. Picton*, 218 Fed. 401.

³² *Central Grain & Stock Exchange of Hammond v. Board of Trade of City of Chicago*, 125 Fed. 463. *Jenkins, J.*,

said: "It is urged that by appealing the defendant below waived its motion to quash, and that such act is tantamount to a general appearance. It is indeed said by some courts that one objecting to the jurisdiction of a court must keep out of court except to object to its jurisdiction, and that an appeal from a judgment is a general appearance to the action. *Fee v. Big Sand Iron Company*, 13 Ohio St. 563; *Ruthe v. Railway Company*, 37 Wis. 344; *Hodges v. Frazier*, 31 Ark. 58; *Railway Company v. Heath's Administrator*, 87 Ky. 651, 9 S. W. 832. This doctrine has not, however, obtained in the federal courts. It is true a party 'may not, in the same breath, dispute the merits of the cause alleged

§ 6013. Venue. The subject of the venue of actions against

against him and deny jurisdiction of the court over his person' (Crawford v. Foster, 28 C. C. A. 576, 84 Fed. 939); but when a party appears specially to object to the jurisdiction or to move to set aside the service of process, he is deemed not to have waived the illegality of the service, if, after such motion is denied, he answers to the merits. Such illegality in the service is waived only when, without having insisted upon it, he pleads in the first instance to the merits. Thus, in *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237, process in a district court of a territory was served upon the defendant within an Indian reservation. The motion to set aside the service was overruled, and the defendant pleaded to the merits. The Supreme Court reversed the judgment against the defendant, and remanded the cause with a direction to set aside the service. Mr. Justice Field, delivering the opinion of the court, remarked: 'The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of the counsel for him to move the dismissal of the action on that ground, or, what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further contestation. It is only where he pleads to the merits in the first instance, without insisting upon

the illegality, that the objection is deemed to be waived.' See, also, *Insurance Company v. Dunn*, 19 Wall. 214, 22 L. Ed. 68; *Removal Cases*, 100 U. S. 457, 475, 25 L. Ed. 593; *Railway Company v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *Powers v. Railway Company*, 169 U. S. 92, 102, 18 Sup. Ct. 264, 42 L. Ed. 673; *Louisville Trust Company v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. Here the appellant has at no time—unless by the appeal—consented to the jurisdiction of the court or waived its objection thereto. No act was done which suggests such consent or waiver. The appellant was confronted with an order for an injunction issuing because it had failed to do that which the court had no right to require it to do. It had no remedy save by appeal, the court declining to proceed with the inquiry touching its jurisdiction. Under such circumstances, to hold that an appeal works a general appearance to the suit—notwithstanding it was limited to the jurisdiction of the court to make the order—would work a grievous wrong, and would subject the party to a judgment upon the merits without remedy, when the record does not disclose jurisdiction of the court, and notwithstanding the constant objection of the defendant to the exercise of jurisdiction. Such result cannot be warranted by the law. A party protesting against jurisdiction may not be compelled to submit to a decree upon the merits when the court withholds its judgment upon its jurisdiction. Indeed, the allowance of the injunction under the circumstances was in effect a denial by the court of the motion to set aside the service, and that without the evidence before it, and solely as a penalty for misconduct, unwarrantably assumed. The only remedy

corporations generally has been considered at length elsewhere in this work.³³

The venue of actions against foreign corporations is usually dependent upon legislative enactment, and, of course, varies in the different jurisdictions.³⁴ Statutes giving the right to sue foreign

afforded the party in such case is by appeal from the wrongful order which denies consideration of the challenge to the jurisdiction. Within the ruling of *Harkness v. Hyde*, supra, the party so debarred of his right may raise the question by appeal from a judgment upon the merits." See also §§ 3018, 3125, supra, and *Whitehouse Eq. Pr.* § 186.

³³ See §§ 2978-2984, supra.

For the residence of corporations for the purposes of venue, see §§ 397, 398, supra.

³⁴ See the statutes of the respective states. See also the following decisions:

United States. *Hills v. Richmond & D. R. Co.*, 37 Fed. 660.

Alabama. *Ex parte Western U. Tel. Co.*, 76 So. 438, rev'g 15 Ala. App. 532, 74 So. 88; *H. M. Judge & Co. v. Washburn-Crosby Milling Co.*, 1 Ala. App. 470, 56 So. 2.

California. *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239.

Colorado. *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899.

Georgia. *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303; *Cincinnati, N. O. & T. P. R. Co. v. Pless & Slade*, 3 Ga. App. 400, 60 S. E. 8.

Indiana. *Edwards v. Van Cleave*, 47 Ind. App. 347, 94 N. E. 596.

Kentucky. *House v. Bank of Lewisport*, 178 Ky. 281, 198 S. W. 760; *Barnes v. Union Cent. Life Ins. Co.*, 168 Ky. 253, 182 S. W. 169; *Employers' Indemnity Co. v. Duncan*, 159 Ky. 460, 167 S. W. 414.

Louisiana. *Davis v. Kenefick, Hammond & Quigley Const. Co.*, 121 La. 251, 46 So. 301.

Massachusetts. *Reynolds v. Missouri, K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913; *Allen v. Pacific Ins. Co.*, 21 Pick. 257.

Missouri. *State v. Jones*, 270 Mo. 230, 192 S. W. 980.

New York. *Goldzier v. Central R. Co. of New Jersey*, 43 Misc. 667, 88 N. Y. Supp. 214.

North Carolina. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353; *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

Ohio. *Handy v. Insurance Co.*, 37 Ohio St. 366.

Oklahoma. *Roff Oil & Cotton Co. v. King*, 46 Okla. 31, 148 Pac. 90; *Nelson v. Deming Inv. Co.*, 21 Okla. 610, 96 Pac. 742.

Oregon. *Ramaswamy v. Hammond Lumber Co.*, 78 Ore. 407, 152 Pac. 223; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, rehearing denied 101 Pac. 1099.

Pennsylvania. *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076; *Frick & Lindsay Co. v. Maryland, Pennsylvania, etc., Co.*, 44 Pa. Super. Ct. 518.

South Carolina. *Hayes v. Seaboard Air Line Ry.*, 98 S. C. 6, 81 S. E. 1102; *Elms v. Southern Power Co.*, 78 S. C. 323, 58 S. E. 809.

Tennessee. *Brewer v. De Camp Glass Casket Co.*, 139 Tenn. 97, 201 S. W. 145.

Texas. *Coca-Cola Co. v. Allison*, 52 Tex. Civ. App. 54, 113 S. W. 308.

Virginia. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Washington. *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35.

corporations in a particular county are to be considered in connection with other general statutes regulating venue of actions against corporations generally in order to determine their proper construction.³⁵ General statutes relating to venue do not apply to local actions

West Virginia. *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917; *Quesenberry v. People's Building, Loan & Savings Ass'n*, 44 W. Va. 512, 30 S. E. 73.

Under Virginia Code, §§ 3215 and 3214, pars. 1, 4, a foreign corporation may be sued in the county or corporation where the cause or some part of it arose, or where a co-defendant resides, or where it has debts or estate. *Guarantee Co. of North America v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909.

Prior to the Oregon Act of 1903, a foreign corporation like a domestic one was suable at the county of its residence, i. e., where it maintained its principal agency or place of business in the state, or where the cause of action arose. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, rehearing denied 101 Pac. 1099.

Under Bal. Code Wash. § 4854, a foreign corporation cannot be sued where it has no office and no agent, the statutory agent being served in another county. *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35.

Under N. C. Rev. St. 1905, § 423, a foreign corporation may be sued either in the county in which the cause of action arose or in which the plaintiff resides. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353.

For venue of suits against foreign corporations in Missouri, see *State v. Jones*, 270 Mo. 230, 192 S. W. 980.

In Georgia personal injuries are suable only where the cause of action originated, the corporation being foreign, or where its lessor has a residence if it be operating under a domestic franchise. It is not suable in

a county merely because it has a place of business there. *Coakley v. Southern R. Co.*, 120 Ga. 960, 48 S. E. 372.

In Tennessee, a foreign corporation operating a domestic railroad franchised to have its principal office at a certain place may be sued there for an injury in another county, if it has an office at such place even though its principal office is in another state and it has another office in Georgia of equal importance and powers. *Williams v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

In Texas, a foreign associate corporation may be sued on a joint liability where the domestic one is suable. *Houston, E. & W. T. Ry. Co. v. Granberry*, 16 Tex. Civ. App. 391, 40 S. W. 1062.

Under Ga. Code, § 3407, in an action for a tort a foreign lessee corporation may be served by leaving a copy of the summons at the superintendent's office, being its principal office and that of the lessor. *Hills v. Richmond & D. R. Co.*, 37 Fed. 660.

See *Cincinnati, N. O. & T. P. R. Co. v. Pless & Slade*, 3 Ga. App. 400, 60 S. E. 8, holding that a nonresident corporation is, except in certain cases where by statute the contrary is prescribed, subject to suit in any county where it can be served or where it submits itself to the jurisdiction of the court by a general appearance.

³⁵ **Colorado.** See *Austin v. King*, 25 Colo. App. 363, 138 Pac. 57.

Idaho. *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826, overruling *Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405.

or to those for which a venue is specially prescribed.³⁶ Generally, whenever any element of locality is inherent in such statutes, actions though of a similar nature to those described, but incapable of the prescribed locality are governed by the more general statutes and must be brought accordingly. Thus, the statute fixing venue according to the place of residence, or of injury, or accrual of the cause, or of operation and location of defendant's railroad, are not to be regarded as applying to causes arising beyond the state or against a foreign corporation or both, and therefore not susceptible of localization by such tests.³⁷ Consequently they are suable in a venue regu-

Massachusetts. *Allen v. Pacific Ins. Co.*, 21 Pick. 257.

North Carolina. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793.

Ohio. *Handy v. Insurance Co.*, 37 Ohio St. 366.

Oklahoma. *Nelson v. Deming Inv. Co.*, 21 Okla. 610, 96 Pac. 742.

Pennsylvania. *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076.

Tennessee. See *Brewer v. De Camp Glass Casket Co.*, 139 Tenn. 97, 201 S. W. 145.

See § 2978, *supra*.

The statute enabling persons to sue foreign corporations in the county where the cause of action arose was designed to give an optional venue and not to limit such suits to such county. *Handy v. Insurance Co.*, 37 Ohio St. 366.

Under Mass. Rev. St. c. 90, §§ 14, 16, a nonresident can sue a foreign corporation in any county, and not only where its place of business is situated. *Allen v. Pacific Ins. Co.*, 21 Pick. (Mass.) 257. See also *Reynolds v. Missouri, K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913.

A foreign corporation does not gain a fixed residence by designating an agent in the state upon whom process in actions against it may be served. *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826, over-

ruling *Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405.

In North Carolina an action against a foreign corporation for penalty for delay in carriage may be tried either where the cause of action arose (Rev. § 420), being the ordinary venue, or where the defendant does business or has property, or where the plaintiff resides. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793. For construction of N. C. Rev. St. § 423, see *Ange v. Sovereign Camp, Woodmen of World*, 171 N. C. 40, 87 S. E. 955; *Richmond Cedar Works v. J. L. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770.

For doctrine in Alabama concerning venue in actions against foreign corporations, see *Alabama Great Southern R. Co. v. Ambrose*, 163 Ala. 220, 50 So. 1030; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 377, 25 L. R. A. 543, 15 So. 941; *Southern Ry. Co. v. Gogins*, — Ala. App. —, 73 So. 958.

For venue of actions against foreign corporations in Pennsylvania, see *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076.

³⁶ See §§ 2982, 2978, *supra*.

³⁷ *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990; *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950, explaining *Insurance Co. of North America v. McLimans*, 28 Neb. 653, 44 N. W. 991.

See §§ 397, 398, 2978, *supra*.

lated by other statutes of general application to the venue of actions.³⁸

Both upon principle and authority, private corporations are residents of the state in which they are created. They have, and can have, but one domicile—that, the state of their birth, and which is fixed by the charter of incorporation. They may migrate into other countries and jurisdictions for the purposes of business, and may be permitted to carry on business in other states; yet, so far as jurisdiction of its courts is concerned, they are treated both by the federal courts and the state courts as residents of the state in which they were created, and nonresidents of other states.³⁹ A foreign corporation being incapable of a residence within any state but its domicile,⁴⁰ may be sued at the county of the plaintiff's residence,⁴¹ or elsewhere at his option,⁴² in any county which the law permits to be

Nebraska Code Civ. Proc. § 55 has application to domestic corporations only, and permits suit against an insurance company in the county where the cause of action arose but does not admit of suit against a foreign corporation on a foreign cause of action. *Western Travelers' Acc. Ass'n v. Taylor*, 62 Neb. 783, 87 N. W. 950, explaining *Insurance Co. of North America v. McLimans*, 28 Neb. 653, 44 Neb. 991.

See *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076.

In Georgia the statutory rule confining suits against railway companies for torts to the county where the cause of action arose does not apply to torts committed beyond the limits of the state by nonresident railway companies. *Cincinnati, N. O. & T. P. R. Co. v. Pless & Slade*, 3 Ga. App. 400, 60 S. E. 8.

³⁸ *South Carolina & G. R. Co. v. Dietzen*, 101 Ga. 730, 29 S. E. 292; *Barnes v. Union Cent. Life Ins. Co.*, 168 Ky. 253, 182 S. W. 169; *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990; *Ballard v. Chesapeake & O. Ry. Co.*, 42 W. Va. 1, 24 S. E. 602.

Kentucky Code, § 78, regulating actions "not required by the foregoing sections * * * to be brought in

some other county," authorizes suit to be brought in the county where the defendant, or one of several defendants, resides, where the cause of action arose beyond the state against a foreign corporation. *Chesapeake & O. R. Co. v. Cowherd*, 96 Ky. 113, 27 S. W. 990.

Under W. Va. Code, c. 123, § 1, the place where the Chesapeake & Ohio Ry. Company may be doing business is not a proper venue for an action for a foreign tort, but its statutory principal office within the state fixes it, or the residence of the president or chief officer in the county of the suit. *Ballard v. Chesapeake & O. Ry. Co.*, 42 W. Va. 1, 24 S. E. 602.

³⁹ See § 397, *supra*. See also *Ivanusch v. Great Northern R. Co.*, 26 S. D. 158, 128 N. W. 333.

⁴⁰ See §§ 397, 2979, *supra*.

⁴¹ *Ivanusch v. Great Northern R. Co.*, 26 S. D. 158, 128 N. W. 333.

⁴² *Rains v. Diamond Match Co.*, 171 Cal. 326, 153 Pac. 239; *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Waechter v. Atchison, T. & S. F. R. Co.*, 10 Cal. App. 70, 101 Pac. 41; *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Boyer v. Northern Pac. R. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac.

chosen for the bringing of such actions, as is noted elsewhere.⁴³

In the absence of any statutory provision fixing the place of trial in actions against foreign corporations in any particular, actions may be brought against them in any county in the state where it has an agent upon whom process may be lawfully served.⁴⁴

Where a statute provides that a foreign corporation doing business in the state shall have an office therein or an agent thereat upon whom process against the corporation may be served, it is usually provided that actions against the corporation shall be brought in the county where the office is situate or the agent resides.⁴⁵

Under a statute providing that foreign corporations doing busi-

826; *Ramaswamy v. Hammond Lumber Co.*, 78 Ore. 407, 152 Pac. 223.

⁴³ See §§ 2978-2979, *supra*.

Under a statute providing that where the defendant is a nonresident of the state, suit against it may be brought in any county in the state, it is held that a foreign corporation having an office in the state is to be treated as a nonresident defendant, and may be sued in any county in the state. *Estill v. New York, L. E. & W. R. Co.*, 41 Fed. 849; *Stone v. Travelers' Ins. Co.*, 78 Mo. 655.

A foreign corporation is "found" within the meaning of sec. 7619, Neb. Rev. St. 1913, in any county in which proper service can be had. *Juckett v. Brennaman*, 99 Neb. 755, 157 N. W. 925; *Council Bluffs Canning Co. v. Omaha Tinware Co.*, 49 Neb. 537, 68 N. W. 929.

⁴⁴ *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Hocker v. Western U. Tel. Co.*, 45 Fla. 363, 30 So. 901; *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826, overruling *Easley v. New Zealand Ins. Co.*, 4 Idaho 205, 38 Pac. 405; *Webster v. Oregon Short-Line R. Co.*, 6 Idaho 312, 55 Pac. 661; *Reynolds v. Missouri, K. & T. Ry. Co.*, 228 Mass. 584, 117 N. E. 913.

In the absence of any statutory provision fixing the place of trial, in actions against foreign corporations,

an action may be brought and maintained in any county of the state. *Waechter v. Atchison, T. & S. F. Ry. Co.*, 10 Cal. App. 70, 101 Pac. 41; *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826. See also *Olson v. Osborne & Co.*, 30 Minn. 444, 15 N. W. 876.

In Idaho no statute gives to corporations, either foreign or domestic, the privilege of being sued only at their principal place of business or the residence of the designated agent. *Smith v. Inter-Mountain Auto Co.*, 25 Idaho 212, 136 Pac. 1125.

In Oklahoma an action affecting an interest in real estate where the real estate is situated in one county and the defendant is a foreign corporation having a designated agent residing in another county may be instituted in the county where the land is situated, and service had upon such agent in another county. *Nelson v. Deming Inv. Co.*, 21 Okla. 610, 96 Pac. 742. See *Roff Oil & Cotton Co. v. King*, 46 Okla. 31, 148 Pac. 90.

⁴⁵ *United States. Angerhoefer & Bradstreet Co.*, 22 Fed. 305.

Alabama. Sullivan v. Sullivan Timber Co., 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

Florida. Hocker v. Western U. Tel. Co., 45 Fla. 363, 34 So. 901.

Idaho. Easley v. New Zealand Ins. Co., 4 Idaho 205, 38 Pac. 405, over-

ness within the state may be sued in any court within the state having jurisdiction over the subject-matter in any county where the cause of action or a part thereof accrued, a cause of action is made up of the contract and the breach of it, and it takes these two parts, in case of an action against a corporation for a breach of warranty and like cases, to constitute the whole cause of action, within the meaning of such statute; otherwise the added phrase, "or a part

ruled in *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho 74, 70 L. R. A. 691, 66 Pac. 826.

Indiana. *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

Louisiana. *State v. Western U. Tel. Co.*, 48 La. Ann. 81, 18 So. 910.

Minnesota. *Olson v. Osborne & Co.*, 36 Minn. 444, 15 N. W. 876.

Missouri. *Harding v. Chicago & A. R. Co.*, 80 Mo. 659; *Roberts v. State Ins. Co.*, 26 Mo. App. 92.

New York. *Jay v. Long Island R. Co.*, 2 Daly 401.

Ohio. *Swan v. Mansfield, C. & L. M. R. Co.*, 4 Ohio S. & C. P. Dec. 71.

Oklahoma. *Nelson v. Deming Inv. Co.*, 21 Okla. 610, 96 Pac. 742.

Pennsylvania. *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076.

Texas. *St. Louis, A. & T. Ry. Co. v. Whitley*, 77 Tex. 126, 13 S. W. 853; *Bradstreet Co. v. Gill*, 72 Tex. 115, 2 L. R. A. 405, 13 Am. St. Rep. 768, 9 S. W. 753; *Coca-Cola Co. v. Allison*, 52 Tex. Civ. App. 54, 113 S. W. 308; *Mutual Life Ins. Co. v. Nicholls* (Tex. Civ. App.), 24 S. W. 910; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576.

West Virginia. *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917; *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 135, 10 S. E. 39. See *Quesenberry v. People's Building, Loan & Savings Ass'n*, 44 W. Va. 512, 30 S. E. 73, holding that a foreign corporation is a "non-resident" within the meaning of a statute providing that if a suit be

against a nonresident of the state, it may be brought in the county wherein he may be found, or may have estate or debts due him, and that a suit against a foreign corporation may be brought in any county wherein it has estate or debts due to it, distinguishing *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 135, 10 S. E. 39.

In construing a statute providing that when any foreign corporation shall have an agency or transact any business in any county of the state, it shall be lawful to sue such corporation in such county, *Moschzisker, J.*, in *Eline v. Western Maryland R. Co.*, 253 Pa. 204, 97 Atl. 1076, said: "Of course, the phrase 'transact any business' does not mean the doing of an occasional piece of business, but the word 'any' is, nevertheless, significant, and evidently was used to convey the thought that, while the business transacted in a county, in order to give jurisdiction, must be habitual in character (*Parke v. Comm. Ins. Co.*, 44 Pa. 422), yet it need not be the chief affairs of the corporation. In other words, counties other than those where a foreign corporation has its headquarters, or transacts its principal business, were intended to be covered by the language employed in the statute, and it was evidently intended to give jurisdiction to the courts of all counties where a foreign corporation regularly carried on business and habitually transacted any of its affairs (*Barr, to Use of Berst, v. King*, 96 Pa. 485, 487)."

thereof" would be without meaning,⁴⁶ and where a contract for the sale of a guaranteed machine was entered into in the state by a citizen thereof with a foreign corporation, the machine to be delivered f. o. b. in another state, the foreign corporation might be sued for breach of warranty in the county in the state where the contract was entered into, as a part of the cause of action accrued in that county.⁴⁷

While statutes regulating the mode and place for serving process may have the effect of forcing the choice of a county in which it is possible to acquire jurisdiction by service,⁴⁸ generally such a state should not be construed either to extend or restrict the place where by law an action against a foreign corporation can be brought, but it is always a question of construction whether the particular statute was intended to regulate process and the place of serving it.⁴⁹ Where it is provided by statute that where neither party to the action was a citizen of the state, the action might be brought in any county of the state, it was held that an action by a citizen of another state against a foreign corporation doing business in the state might be brought in

⁴⁶ *Western Woolen Commission Co. v. Hart* (Tex.), 20 S. W. 131; *Railroad Co. v. Hill*, 63 Tex. 383; *Phillio v. Blythe*, 12 Tex. 124; *Bay City Iron Works v. Reeves & Co.*, 43 Tex. Civ. App. 254, 95 S. W. 739; *Westinghouse Elec. & Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373, 21 S. W. 576; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.

See § 2980, *supra*.

⁴⁷ *Westinghouse Elec. & Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324.

See for other cases construing a statute providing that a foreign insurance corporation may be sued in any county in the state where the cause of action or any part thereof arose, and considering what facts bring the cause of action within the purview of such statute, *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606. And see generally § 2980, *supra*.

⁴⁸ See §§ 2978, 3007, 2991 et seq., *supra*.

⁴⁹ See *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099, denying rehearing 54 Ore. 13, 101 Pac. 213; *Frick & Lindsay Co. v. Maryland, Pennsylvania, etc., Co.*, 44 Pa. Super. Ct. 518.

The Act of 1901 (P. L. 614) applies to foreign corporations as well as domestic, and affects service only where process is legally issued in the county. *Frick & Lindsay Co. v. Maryland, Pennsylvania, etc., Co.*, 44 Pa. Super. Ct. 518.

Laws of Oregon, 1903, p. 111, providing for the appointment of a resident agent for service upon a foreign corporation doing business in the state and requiring a statement of the principal place of business to be filed, was not intended to fix the place for suit, but only to afford evidence of location. *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 1099, denying rehearing 101 Pac. 213.

any county in the state, even though it had officers residing in a certain county therein and a mine situated in the latter county.⁵⁰

As has been stated elsewhere, under the statutes permitting actions to be brought in the county where any of several defendants resided or has his place of business, that of a co-defendant of the corporation may be chosen though the corporation could not be sued there, though this cannot be done unless a cause of action is pleaded against such co-defendant.⁵¹ Under statutes permitting actions to be brought in the county where any of several defendants resides or has its place of business, a foreign associate corporation may be sued on a joint liability where a domestic one is suable.⁵²

By complying with the requirements of law as to the appointment of an agent upon whom process might be served, a foreign corporation doing business in Idaho acquires the same rights as, but no greater than those of, a citizen, so far as the venue of actions against it is concerned.⁵³

It is held in Texas that an appearance by a foreign corporation does not waive its privilege of venue, but only its right to object to the jurisdiction.⁵⁴

No person or corporation has any vested right to any particular remedy or form of proceeding and venue in civil actions against foreign or domestic corporations belongs to the procedure or remedy and is no part of the right itself.⁵⁵

⁵⁰ Bishop v. Silver Lake Min. Co., 62 N. H. 455.

⁵¹ See § 2979, *supra*.

⁵² Houston, E. & W. T. Ry. Co. v. Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062.

In Texas a statute permits a connecting carrier to be sued in the county where the initial one is sued. It is held that a foreign corporation whose railroad extends to the state boundary and there connects with a domestic line is not "operating any part of its road" within the state and though it is a connecting carrier it cannot be sued in any county where the other extends (Gen. Laws 1899, c. 125, p. 214), but must be sued where it has its chief office. St. Louis, I. M. & S. R. Co. v. J. H. White & Co., 97 Tex. 493, 80 S. W. 77.

⁵³ Webster v. Oregon Short-Line R. Co., 6 Idaho 312, 55 Pac. 661.

Under a statute providing that the venue of an action in a justice's court in case of injury to the person or property shall be in the precinct or city where the injury was committed or where the defendant resides, it is held that a foreign corporation doing business in the state may be sued in a justice's court, in the precinct in which an injury to property occurs, to recover damages for such injury, although such precinct may be in a county other than the one in which its principal place of business is, and its duly-designated agent to receive process for it resides. Webster v. Oregon Short-Line R. Co., 6 Idaho 312, 55 Pac. 661.

⁵⁴ Atchison, T. & S. F. R. Co. v. Forbis, 35 Tex. Civ. App. 255, 79 S. W. 1074.

⁵⁵ Southern R. Co. v. Jordan, 192 Ala. 528, 68 So. 418; Drennen Motor

The place for trial in the federal courts is now fixed by the United States Judicial Code, material excerpts from which have been given elsewhere.⁵⁶ National banks are declared by statute to be citizens of the states in which they are located,⁵⁷ but no similar provision having been made as to nationally incorporated railroad companies, it has been held that they are not citizens of any state for the purpose of jurisdiction.⁵⁸ Such a corporation is a resident for the purpose of venue in a state or district where it has a principal office located.⁵⁹ As in actions between natural persons, there may be a change of venue to that county or place where the defendant foreign corporation has an absolute privilege to be sued.⁶⁰ There is nothing apparently peculiar to foreign corporations in the law regulating the grounds and occasions for a change of venue on account of prejudice, difficulty in getting a fair trial or convenience. As to such grounds of change consult the local statutes and any standard work on practice.⁶¹

§ 6014. Right of foreign corporation to defend suit against it.

When a foreign corporation is sued, it has a right to defend the suit on all proper grounds.⁶² Under a statute requiring foreign corpora-

Car Co. v. Evans, 192 Ala. 150, 68 So. 303; Home Protection v. Richards & Sons, 74 Ala. 466; Southern Ry Co. v. Goggins, — Ala. App. —, 73 So. 958.

⁵⁶ See §§ 2978, 2979, *supra*.

⁵⁷ Judicial Code, § 24, ¶ 16. See §§ 402, 2961, *supra*.

⁵⁸ Bankers' Trust Co. v. Texas & P. R. Co., 241 U. S. 295, 60 L. Ed. 1010. See also §§ 401, 2961, *supra*.

⁵⁹ *Re Dunn*, 212 U. S. 374, 53 L. Ed. 558; *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

A national corporation may be sued in any federal district where it does business though its principal office is in another state. *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

⁶⁰ *In re New Haven Clock Co. v. Hubbard*, 61 Hun (N. Y.) 625, 16 N. Y. Supp. 125; *Gorman v. South Boston Iron Co.*, 32 Hun (N. Y.) 71; *International Life Assur. Co. v. Sweetland*, 14 Abb. Pr. (N. Y.) 240.

See § 2983, *supra*.

⁶¹ See §§ 2983-2984, *supra*.

For application for change of venue

and procedure thereon, see § 2984, *supra*.

⁶² *United States*. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893.

Idaho. *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 17 Idaho 273, 105 Pac. 562.

Kansas. *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

New York. *Bischoff v. Automobile Touring Co.*, 97 App. Div. 174, 89 N. Y. Supp. 594; *J. R. Alsing Co. v. New England Quartz & Spar Co.*, 66 App. Div. 473, 73 N. Y. Supp. 347, *aff'd* 174 N. Y. 536, 66 N. E. 1110.

Wisconsin. *Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co.*, 144 Wis. 362, 129 N. W. 595.

See §§ 2926, 2952, 5969, *supra*.

"The right to defend when sued is well established and recognized. As stated in *Windsor v. McVeigh*, 93 U. S. 277, 23 L. Ed. 914: 'Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural

tions seeking to do business in the state to perform certain prescribed conditions and providing that for a failure to comply with the requirements of the statute such corporations shall be prohibited from maintaining actions in the courts of the state, it is held that the prohibition of the commencement or of the maintenance of suits is not an inhibition of the right to defend actions in such courts.⁶³ Such a statute has no application to corporations which have been summoned into court and made to defend actions brought by other parties.⁶⁴ A statute prohibiting a foreign corporation from maintaining actions in the courts of a state where it has not complied with certain statutory conditions precedent to its right to do business in the state does not prevent the corporation from asserting a counterclaim arising out of the subject-matter of the suit.⁶⁵

A different rule, however, obtains where the statute makes contracts by noncomplying corporation void.⁶⁶

§ 6015. Right of foreign corporation to assert as a defense non-compliance with statutory requirements. As has been seen elsewhere, statutes prohibiting foreign corporations from doing business in the state until they have performed certain conditions prescribed by statute as a prerequisite to their doing business in the state are intended for the protection of the citizens of the state who may deal with such corporations, and, if they do not in terms contain any prohibition against dealing with corporations which have not performed the conditions, they are not to be construed as preventing a

justice, recognized as such by the common intelligence and conscience of all nations.' The principle is so well recognized that citation of authority is unnecessary." Siebecker, J., in *Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co.*, 144 Wis. 362, 129 N. W. 595.

A corporation may institute criminal proceedings for larceny of its property, although in default as to the compliance with the laws of the state wherein it is doing business and wherein it suffered the wrong. *Wilder v. Com.*, 28 Ky. L. Rep. 619, 89 S. W. 732.

As to the right of corporation to appeal, see § 5970, *supra*.

⁶³ *Blodgett v. Lanyon Zinc Co.*, 120

Fed. 893; *Swift & Co. v. Platte*, 68 Kan. 1, 74 Pac. 635, 72 Pac. 271; *Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co.*, 144 Wis. 362, 129 N. W. 595.

⁶⁴ *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; *Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co.*, 144 Wis. 362, 129 N. W. 595.

⁶⁵ *J. R. Alsing Co. v. New England Quartz & Spar Co.*, 66 N. Y. App. Div. 473, 73 N. Y. Supp. 347, *aff'd* 174 N. Y. 536, 66 N. E. 1110.

⁶⁶ *Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co.*, 144 Wis. 362, 129 N. W. 595; *Ashland Lumber Co. v. Detroit Salt Co.*, 114 Wis. 66, 89 N. W. 904.

citizen from maintaining an action against it on the contract. To hold otherwise would make the statute an instrument of fraud against those whom it was intended to protect.⁶⁷ Aside from this principle, a foreign corporation, if it does business in a state and enters into contracts without having complied with the conditions imposed by statute, will be estopped to set up its noncompliance with the statute for the purpose of escaping liability on its contracts, as it cannot thus take advantage of its own wrong. A foreign corporation when sued for a tort committed by it in a state cannot urge as a defense that it had not complied with the laws of such state imposing certain conditions precedent to its right to do business therein.⁶⁸

§ 6016. Pleadings in actions against foreign corporations. The same rules of pleadings apply to corporate parties as to other parties, and the law of pleading is general as to all of them.⁶⁹ As a general rule, both actions at law and suits in equity against foreign corporations must be brought against the corporation itself in the corporate name.⁷⁰ It seems that by comity a foreign corporation might be sued by the name of its president if that was the law of its existence and creation, but it would not be obligatory to do so.⁷¹ The general rule in the majority of states is that an allegation of the corporate existence of the defendant foreign corporation is not necessary.⁷² While

⁶⁷ See § 5953, *supra*.

⁶⁸ See § 5954, *supra*.

⁶⁹ *Hunt v. San Francisco*, 11 Cal. 250; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Thorn & Maynard v. New York Cent. Mills*, 10 How. Pr. (N. Y.) 19, *aff'd sub nom. Shearman v. New York Cent. Mills*, 1 Abb. Pr. (N. Y.) 187. See § 3038 *et seq.*, *supra*.

⁷⁰ See § 3041, *supra*.

⁷¹ See § 3041, *supra*. See also *Saunders v. Adams Express Co.*, 71 N. J. L. 270, 57 Atl. 899, *aff'd* 71 N. J. L. 520, 58 Atl. 1101.

⁷² See § 3042, *supra*. See also *Saunders v. Adams Exp. Co.*, 71 N. J. L. 520, 58 Atl. 1101, *aff'g* 71 N. J. L. 270, 57 Atl. 899; *Clegg v. Chicago Newspaper Union*, 8 N. Y. Civ. Proc. 401; *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218; *Machen v. Western U. Tel. Co.*,

63 S. C. 363, 41 S. E. 448.

In *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218, an unnecessary allegation of this fact was called surplusage, but that was in connection with the decision that it need not be proved because immaterial, and it was probably not meant that it was such impertinent matter as might be stricken out.

Where the petition of the plaintiff alleges that the defendant is a foreign corporation, and the defendant does not put the question in issue, a subsequent affidavit by an attorney under section 4765, Rev. Laws 1910, is sufficient without an affirmative showing in such affidavit that the defendant is a foreign corporation. *St. Paul Fire & Marine Ins. Co. of St. Paul, Minnesota v. Earl*, 54 Okla. 305, 153 Pac. 867.

such allegation may not be necessary, it is a proper one and one which the careful pleader will make, unless there are circumstances of doubt rendering it unsafe for the plaintiff to assume the burden of proving the incorporation of the defendant should that issue be raised.⁷³ The accepted and formal allegation in a complaint or bill against a foreign corporation is that the defendant was, at the times in question, a corporation duly created by and duly existing under and by virtue of the laws of the state, naming it.⁷⁴ Other allegations as to the place of business or residence may be appropriate for the purposes of jurisdiction or venue, or other purposes,⁷⁵ and, in the case of foreign corporations, such other facts bearing on the right to be sued in the state as by its statutes must be affirmatively alleged.⁷⁶ The general rule is that, in the absence of a statute requiring more, it suffices to be sued by a name importing incorporations,⁷⁷ or by the name of the party with the descriptive words "a corporation," added.⁷⁸ Generally the caption will not serve the office of a necessary allegation of incorporation, though it may also aid it by reference in the body of the complaint.⁷⁹ It has been held, however, that the designation of the defendant in the caption as a corporation is sufficient.⁸⁰

General allegations are sufficient without particularizing the formation and organization step by step, except where the facts themselves are a part of the cause of action.⁸¹ It need not be alleged whether the corporation is domestic or foreign unless the statute

⁷³ See § 3042, *supra*.

⁷⁴ *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218. See § 3043, *supra*.

⁷⁵ See §§ 3043, 3049, *supra*.

⁷⁶ Consult the statutes of the respective states.

See § 3043, *supra*. See also *Coolidge v. American Realty Co.*, 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318; *Snow, Church & Co. v. Snow-Church Surety Co.*, 80 N. Y. App. Div. 40, 80 N. Y. Supp. 512; *Rosenblatt v. New Jersey Novelty Co.*, 45 N. Y. Misc. 59, 90 N. Y. Supp. 816.

⁷⁷ *Union Cement Co. v. Noble*, 15 Fed. 502.

See § 3043, *supra*.

⁷⁸ See § 3043, *supra*.

Statement of name with addition, "a corporation of Hulett, Wyoming,"

is sufficient. *Fruth v. Bolt*, 37 S. D. 393, 158 N. W. 733.

⁷⁹ *Miller v. Pine Min. Co.*, 3 Hasb. (Idaho) 493, 35 Am. St. Rep. 289, 31 Pac. 803; *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N. Y. Supp. 326.

See § 3043, *supra*.

⁸⁰ *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532; *Board Education Walton Dist., Roane County v. Board Trustees, Walton Lodge No. 132*, I. O. O. F., 78 W. Va. 445, 88 S. E. 1099.

Title stating name of defendant, "a corporation under the laws of the state of Iowa," and references in the body of the complaint to "defendant" is sufficient. *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

⁸¹ *Educational Soc. of Denomina-*

requires such particulars or it is involved in pleading some fact essential in or prerequisite to the action.⁸² Thus under a statute providing that a foreign corporation may be sued by a resident of the state or by a domestic corporation for any cause of action and that it may be sued by a foreign corporation or by a nonresident: "1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof; 2. Where it is brought to recover real property situated within the state, or a chattel which is replevied within the state; 3. Where the cause of action arose within the state, except when the object of the action is to affect the title to real property, situated without the state," the complaint must show the facts requisite to establish the jurisdiction of the court.⁸³ Under such statute, if the complaint is silent as to any one of these facts, no allegation making out a ground of jurisdiction over the cause of action because of its nature is required, the presumption that a court of general jurisdiction has jurisdiction being effective to sustain the jurisdiction.⁸⁴ Thus it is not necessary for a resident to set up his residence when suing a foreign corporation, as it is a matter of defense to show that he is not a resident, and so to oust the jurisdiction.⁸⁵ So also a demurrer for want of jurisdiction will

tion Called Christians v. Varney, 54 N. H. 376. See § 3043, *supra*.

⁸² Head v. J. M. Robinson, Norton & Co., 191 Ala. 352, 67 So. 976; Imperial Curtain Co. v. Jacob, 163 Mich. 72, 127 N. W. 772; Kaulbach v. Knickerbocker Trust Co., 139 N. Y. App. Div. 566, 124 N. Y. Supp. 286; Harmon v. Vanderbilt Hotel Co., 79 Hun (N. Y.) 392, 29 N. Y. Supp. 783, judgment affirmed 143 N. Y. 663, 39 N. E. 20.

See § 3043, *supra*. See also Beebe v. Northwestern Dairy Co., 62 Wash. 164, 113 Pac. 573.

⁸³ Coolidge v. American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318; Snow, Church & Co. v. Snow-Church Surety Co., 80 N. Y. App. Div. 40, 80 N. Y. Supp. 512; Rosenblatt v. New Jersey Novelty Co., 45 N. Y. Misc. 59, 90 N. Y. Supp. 816.

Under a statute providing that "service of process can be made upon a foreign corporation only either where

it has property within the state, or the cause of action arose therein, or the cause of action exists in favor of a resident of the state," it was held that it was not necessary to set out in the complaint the existence of some one of the facts in order to give the court jurisdiction of the subject-matter of the action, as they constituted no part of the plaintiff's cause of action, and therefore the omission to set them out in the complaint did not render it demurrable. Friezen v. Allemania Fire Ins. Co., 30 Fed. 349.

⁸⁴ Brisbane v. Pennsylvania R. Co., 141 N. Y. App. Div. 366, 125 N. Y. Supp. 1042; Carter v. Herbert Booth King & Bro. Pub. Co., 26 N. Y. Misc. 652, 56 N. Y. Supp. 382.

⁸⁵ Brisbane v. Pennsylvania R. Co., 141 N. Y. App. Div. 366, 125 N. Y. Supp. 1042; Herbert v. Montana Diamond Co., 81 N. Y. App. Div. 212, 80 N. Y. Supp. 717; McGinniss v. Amal-

not reach a foreign corporation where the place of contract is not stated or the place of residence of the plaintiff.⁸⁶ In courts of limited, special or inferior jurisdiction such allegations are jurisdictional, and should be pleaded.⁸⁷

The defensive and dilatory pleadings, and the proper method of defense by corporations generally have been fully considered in another portion of this work, and the principles there laid down apply generally to foreign corporations.⁸⁸ When and how objections to the jurisdiction or matters of abatement may be urged in general have been considered in another portion of this work.⁸⁹ In an action against a foreign corporation, if the matter showing lack of jurisdiction appears on the face of the bill or other initial pleading by the plaintiff, the question should be raised by demurrer.⁹⁰ Where, however, it does not so appear, the question may be raised by a plea setting forth the matter showing that the court has not jurisdiction.⁹¹

gamated Copper Co., 45 N. Y. Misc. 106, 91 N. Y. Supp. 591; *Carter v. Herbert Booth King & Bro. Pub. Co.*, 26 N. Y. Misc. 652, 56 N. Y. Supp. 382. See, however, *Bogert v. Otto Gas Engine Works*, 28 N. Y. App. Div. 463, 51 N. Y. Supp. 118; *Voshefskey v. Hillside Coal & Iron Co.*, 21 N. Y. App. Div. 168, 47 N. Y. Supp. 386; *Brown v. Travelers' Life & Accident Ins. Co.*, 21 N. Y. App. Div. 42, 47 N. Y. Supp. 253; *O'Reilly v. New Brunswick, A. & N. Y. Steamboat Co.*, 28 N. Y. Misc. 112, 59 N. Y. Supp. 261, rev'g 26 N. Y. Misc. 195, 55 N. Y. Supp. 1133.

Under N. Y. Code Civ. Proc. § 1780, providing that a resident of the state or a domestic corporation may sue a foreign corporation, the fact that the plaintiff is a resident of the state need not be stated in the complaint. *Herbert v. Montana Diamond Co.*, 81 N. Y. App. Div. 212, 80 N. Y. Supp. 717; *Grant v. Greene*, 59 N. Y. Misc. 1, 111 N. Y. Supp. 1089, rev'd *Grant v. Cobre Grande Copper Co.*, 126 N. Y. App. Div. 750, 111 N. Y. Supp. 386, 193 N. Y. 306, 86 N. E. 34; *McGinniss v. Amalgamated Copper Co.*, 45 N. Y. Misc. 106, 91 N. Y. Supp. 591; *Carter v. Herbert Booth King & Bro. Pub.*

Co., 26 N. Y. Misc. 652, 56 N. Y. Supp. 382.

⁸⁶ *Carter v. Herbert Booth King & Bro. Pub. Co.*, 26 N. Y. Misc. 652, 56 N. Y. Supp. 382.

⁸⁷ *McKeever v. Supreme Court Independent Order of Foresters*, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041; *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488.

An allegation that defendant foreign corporation has an office in New York City is essential in an action in the Municipal Court. *McKeever v. Supreme Court Independent Order of Foresters*, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041; *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488. See, also, *O'Reilly v. New Brunswick, A. & N. Y. Steamboat Co.*, 28 N. Y. Misc. 112, 59 N. Y. Supp. 261, rev'g 26 N. Y. Misc. 195, 55 N. Y. Supp. 1133.

⁸⁸ See §§ 3065-3086, *supra*.

⁸⁹ See §§ 3065-3070, *supra*.

⁹⁰ *Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997.

⁹¹ *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Groel v. United Elec. Co. of New Jersey*, 68

A plea in abatement in an action against a foreign corporation on the ground that service has been had on one not the agent of the corporation must exclude every possibility that proper service may not have been had in the action, and it cannot be aided by reference to the process or other paper in the case where they are not made a part of the plea.⁹² The want of the jurisdictional facts of residence or a local office or place of business to give jurisdiction to a court of limited or inferior jurisdiction may be raised by answer.⁹³ An answer in the form of a plea in abatement pleading that defendant is a foreign corporation which has not come within the jurisdiction and has not been served therein on any qualified person, is in abatement and not in bar.⁹⁴ Objection for want of jurisdiction over a foreign corporation because of the nature of the subject-matter cannot be waived by passing a demurrer or answer, but may be made by motion and at any stage of the case, or by the court of its own

N. J. Eq. 249, 59 Atl. 640; *Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997; *Puster v. Parker Mercantile Co.* (N. J. Ch.), 59 Atl. 232.

See *Puster v. Parker Mercantile Co.* (N. J. Ch.), 59 Atl. 232, for a form of plea to a bill in equity against a foreign corporation raising the question of lack of jurisdiction on account of the fact that the defendant had never done business in the state and had never had a contract to be performed in the state, and there had been no legal service of process against the corporation. See, also, *Groel v. United Elec. Co. of New Jersey*, 68 N. J. Eq. 249, 59 Atl. 640, where the sufficiency of a plea to the jurisdiction is considered.

⁹² *C. Callahan Co. v. Wall Rice Milling Co.*, 44 Ind. App. 372, 89 N. E. 418.

A plea in abatement filed by a foreign corporation defendant which does not deny that the cause of action did not arise in the state or that the foreign defendant has property in the state, or that it is doing business in the state where jurisdiction is sought to be acquired, or that the officer of the corporation, upon whom service of

process was had, was at the time within the state as agent and representative of the defendant and engaged in the transaction of business for it is insufficient on demurrer, where the statute provides that actions against a foreign corporation may be brought in any court having jurisdiction of the amount in any county within the state where any property, money, credits or effects belonging or due to the corporation may be found, and that process may be served upon either a domestic or foreign corporation on certain of its officers, and if none of the officers enumerated can be found then service can be had upon any person authorized to transact business in the name of such corporation. *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143.

⁹³ *Epstein v. S. Weisberger Co.*, 52 N. Y. Misc. 572, 102 N. Y. Supp. 488, holding that in the New York Municipal Court failure to allege jurisdictionally that the defendant foreign corporation had an office in the city may be urged by answer.

⁹⁴ *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

motion.⁹⁵ By making an untenable motion to dismiss an action against a foreign corporation for want of jurisdiction over the case, defective jurisdiction over the person may be waived.⁹⁶

The manner of pleading nonexistence or *nul tiel* corporation has been considered in another portion of this work.⁹⁷

The rule is general and well settled that the defense of *ultra vires* is an affirmative one and must be specially pleaded as such, either by or against the corporation.⁹⁸ And this is said to be especially necessary if the corporation is foreign.⁹⁹

Where a foreign corporation is made a defendant in an action, and its charter powers or franchises become the foundation of such action, the same must be pleaded in the petition; and if the corporation be a foreign one, the name of the state by which, and the substantial terms in which, the charter powers and franchises were granted, should appear in the petition.¹ To make out the want of power on the part of a foreign corporation, the law by which it was created should be pleaded in order to determine its powers.²

The amendment of pleadings in actions against corporations generally has been heretofore considered.³ Amendments changing the

⁹⁵ *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y.) 430, 19 N. Y. Supp. 239, rev'g 40 N. Y. St. Rep. 693, 16 N. Y. Supp. 153.

Want of jurisdiction over the corporation cannot be waived or jurisdiction given by consent. *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526.

⁹⁶ *Handy v. Insurance Co.*, 37 Ohio St. 366; *Cleveland, C., C. & I. Ry. Co. v. McLean*, 1 Ohio Cir. Ct. 112, 1 Ohio Cir. Dec. 67.

A demurrer for want of jurisdiction over the person of a foreign corporation being untenable because demurrer only lies when jurisdiction could under no circumstances be had, falls within the rule (Pub. St. p. 629, § 37, and p. 228, § 26,) that demurrer is an appearance and that a corporation may appear to the jurisdiction. *Reynolds v. La Crosse & M. Packet Co.*, 10 Minn. 178.

⁹⁷ See §§ 3070, 3073, *supra*.

⁹⁸ See § 3078, *supra*.

⁹⁹ *Griesa v. Massachusetts Ben. Ass'n*, 60 Hun (N. Y.) 581, 15 N. Y. Supp. 71. See also § 3078, *supra*.

Want of power in a foreign corporation to take above a certain rate of interest must be pleaded as a defense. *Bennington Iron Co. v. Ruthenford*, 18 N. J. L. 158.

¹ See §§ 3051, 3054, *supra*. See also *Brady v. National Supply Co.*, 64 Ohio St. 267, 83 Am. St. Rep. 753, 60 N. E. 218, approving and following *Devoss v. Gray*, 22 Ohio St. 159.

² *Mason v. Standard Distilling & Distributing Co.*, 85 N. Y. App. Div. 520, 83 N. Y. Supp. 343, 13 N. Y. Ann. Cas. 264. See also §§ 3051-3054, *supra*.

³ See § 3080, *supra*.

See for amendments of complaints against foreign corporation so as to show the residence of the parties, *Sands v. G. W. Marquardt & Sons*, 113 Mo. App. 490, 87 S. W. 1011; *Voshefskey v. Hillside Coal & Iron Co.*, 21 N. Y. App. Div. 168, 47 N. Y. Supp. 386.

description of the defendant corporation from a domestic to a foreign corporation, and vice versa, are allowed by what seems to be the better doctrine,⁴ but a contrary view is entertained in some jurisdictions.⁵ And one case disallowed an amendment to describe a foreign corporation by pleading a different state of origin from that first alleged.⁶

Questions relating to the signature and verification of pleadings by corporations in general have been heretofore considered.⁷

What has been heretofore said in reference to substantive allegations in an action by corporations generally on a contract, or on a tort, or

⁴ *Clokey v. International Rubber Clothing & General Supply Co.*, 22 N. Y. Misc. 518, 49 N. Y. Supp. 1014, aff'd 23 N. Y. Misc. 773, 53 N. Y. Supp. 1102; *Caldwell Furnace Foundry Co. v. Peck-Williamson Heating & Ventilating Co.*, 27 Ohio Cir. Ct. 665; *Meitzner v. Baltimore & O. R. Co.*, 224 Pa. 352, 73 Atl. 434.

Changing the description of the defendant by changing the name of the state where it was incorporated does not introduce a new party. *Meitzner v. Baltimore & O. R. Co.*, 224 Pa. 352, 73 Atl. 434.

An amendment to state that the defendant was a West Virginia corporation and thus correct a statement that it was of New Jersey states no new cause of action. *Caldwell Furnace Foundry Co. v. Peck-Williamson Heating & Ventilating Co.*, 27 Ohio Cir. Ct. 665.

An amendment at the close of the plaintiff's case to amend to conform to proof that the defendant was a foreign and not a domestic corporation was held to be properly allowed, the defendant having put it in issue. *Clokey v. International Rubber Clothing & General Supply Co.*, 22 N. Y. Misc. 518, 49 N. Y. Supp. 1014, aff'd 23 N. Y. Misc. 773, 53 N. Y. Supp. 1102.

⁵ *Western Ry. of Alabama v. McCall*, 89 Ala. 375, 7 So. 650; *Hughes v. Diamond Match Co.*, 1 Pennw. (Del.) 140, 39 Atl. 772; *Little v. Vir-*

ginia & Gold Hill Water Co., 9 Nev. 317.

Where a Nevada corporation is alleged, an amendment by substituting a California one is not allowable. *Little v. Virginia & Gold Hill Water Co.*, 9 Nev. 317.

⁶ *Hughes v. Diamond Match Co.*, 1 Pennw. (Del.) 140, 39 Atl. 772, holding that amending the name Diamond Match Co. "under the laws of Connecticut" to the same name "under the laws of Illinois" substitutes a new defendant.

⁷ See § 3083, *supra*.

By statute in New York it is provided that where the party is a foreign corporation, the verification of its pleadings may be made by its attorney. N. Y. Code Civ. Proc. § 525. Under such statute it is held that the answer of a foreign corporation may be verified by its secretary. (*Robinson v. Ecuador Development Co.*, 32 N. Y. Misc. 106, 65 N. Y. Supp. 427); and that where it is verified by its attorney he need not state the grounds of his belief. (*American Audit Co. v. Industrial Federation of America*, 84 N. Y. App. Div. 304, 82 N. Y. Supp. 642.)

Under a statute providing that where a corporation is a party the verification of its pleading may be made by any officer thereof, it is held that the managing director of a foreign corporation is such an officer as will meet the requirements of the stat-

on an equitable right, apply generally to similar actions by a foreign corporation.⁸

§ 6017. Statute of limitations and laches as a defense. The common law fixed no time as to the bringing of actions. Limitations of such time derive their authority from statutes, and in the absence of statutes there can be no such bar arising from lapse of time.⁹

A corporation may be a resident of more than one state as far as statutes of limitations are concerned.¹⁰

In some states it is held that a foreign corporation cannot plead the statute of limitations, though all the time present and doing business in the state.¹¹ Taking the view that the statute of limitations is

note. *Best v. British & American Mortg. Co.*, 131 N. C. 70, 42 S. E. 456.

For verification of complaint by attorney of foreign corporation held to be sufficient under Kentucky Civ. Code Proc. §§ 117 and 550, see *Dengler v. Krell-French Piano Co.*, — Ky. L. Rep. —, 119 S. W. 757.

⁸ See §§ 3051, 3064, *supra*.

See *Beebe v. Northwestern Dairy Co.*, 62 Wash. 164, 113 Pac. 573, where complaint stated that the defendant was a domestic corporation, and the answer of the defendant alleged that it was a foreign corporation.

⁹ *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. Ed. 628; *United States v. Thompson*, 98 U. S. 486, 490, 25 L. Ed. 194; *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060; *Rouss v. Ditmore*, 122 N. C. 775, 30 S. E. 335; *Ireland v. Mackintosh*, 22 Utah 296, 61 Pac. 901. See also §§ 398, 2951, *supra*.

"The statute of limitations is purely a matter of legislative creation. In the absence of any statute upon the subject, lapse of time would not constitute a defense to the right to enforce an obligation. The legislature has prescribed different periods of time within which different species of obligations may be enforced, and to some obligations it has declared that there shall be no limitation of time for their enforcement through its

courts. * * * It would have been competent for the legislature to declare that there should be no limitation of time against the enforcement of any obligation of a foreign corporation." *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

¹⁰ See § 398, *supra*.

¹¹ *United States. Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. 261; *Blossburg & C. R. Co. v. Tioga R. Co.*, 5 Blatchf. 387, Fed. Cas. No. 1,563.

Arkansas. Clarke v. Bank of Mississippi, 10 Ark. 516, 52 Am. Dec. 248.

Kansas. Williams v. Metropolitan St. R. Co., 68 Kan. 17, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6, 74 Pac. 600, quoted approvingly in *Ball Engine Co. v. Bennett*, 98 Neb. 290, 152 N. W. 550, but said in *Tiller v. St. Louis & S. F. R. Co.*, 189 Fed. 994, to be "not only opposed to the great weight of authority in this country, but also to the very reason of the matter itself"; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 96 Am. Dec. 183.

Nebraska. Ball Engine Co. v. Bennett Co., 98 Neb. 290, 152 N. W. 550.

Nevada. Sutro Tunnel Co. v. Belcher Min. Co., 19 Nev. 121, 7 Pac. 271; *Barstow v. Union Consol. Silver Min. Co.*, 10 Nev. 386; *State v. Central Pac. R. Co.*, 10 Nev. 47; *Robinson v. Imperial Silver Min. Co.*, 5 Nev. 44. See *Chollar-Potosi Min. Co. v.*

not available to foreign corporations, it has been held that such a corporation, although transacting business in the state, is "out of the state" within the meaning of the statutory provision that "if when a

Kennedy & Keating, 3 Nev. 361, 93 Am. Dec. 409.

New York. *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Rathbun v. Northern Cent. Ry. Co.*, 50 N. Y. 656; *Mallory v. Tioga R. Co.*, 42 N. Y. 354; *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 App. Div. 205, 108 N. Y. Supp. 704; *Robeson v. Central R. Co. of New Jersey*, 76 Hun 444, 28 N. Y. Supp. 104; *Thompson v. Tioga R. Co.*, 36 Barb. 79.

Oklahoma. *Hale v. St. Louis & S. F. R. Co.*, 39 Okla. 192, L. R. A. 1915 C 554, Ann. Cas. 1915 D 907, 134 Pac. 949.

Wisconsin. *Weyburn & Briggs Co. v. Bemis*, 122 Wis. 321, 99 N. W. 1050; *State v. National Acc. Society*, 103 Wis. 208, 79 N. W. 220; *Travelers' Ins. Co. of Hartford, Connecticut v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372, 78 N. W. 407; *Larson v. Aultman & Taylor Co.*, 86 Wis. 281, 39 Am. St. Rep. 893, 56 N. W. 915.

The rule stated in the text was adopted first in New York, and was followed in other jurisdictions, but it has been abrogated by statute in New York. See N. Y. Code Civ. Proc. §§ 401, 432, subd. 2; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 N. Y. App. Div. 205, 108 N. Y. Supp. 704. In considering the rule enunciated first by the courts of New York and followed in other jurisdictions it was said in *Comey v. United Surety Co.*, 217 N. Y. 268, Ann. Cas. 1917 E 424, 111 N. E. 832: "The law of New York has long been that the time during which a person against whom a cause of action has accrued is absent from the state is not to be taken as any part of the time limited for the com-

mencement of an action (2 R. S. 297, 29; Code of Procedure, 100; Code of Civ. Proc. 401); and this court is committed to the view that there is no distinction in that respect between a limitation prescribed by statute and one imposed by contract (*Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485). The question came up in *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393, decided in 1859, whether corporations are 'persons' within the meaning of that rule. The argument was that such corporations, if persons, are always absent from this state. They dwell, it was said, only in the state of their creation. The argument prevailed, and the decision was that the statute reaches all persons, natural or juristic, and hence that a foreign corporation sued in this state can never avail itself of the statute of limitations. The ruling did not escape criticism (*Tioga R. R. v. Blossburg & Corning R. R.*, 20 Wall. 137, 143, 152, 22 L. Ed. 331), but it was adhered to as settled law. In *Rathbun v. No. C. R. Co.*, 50 N. Y. 656, decided in 1872, and in *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157, decided in 1881, we applied it to railroad corporations which though organized in other states, operated their lines in this state and were permanently represented here by officers and agents." This doctrine was, however, abrogated by statute in New York, where it is provided that a foreign corporation may plead the statute of limitations when it has complied with the statute providing for the appointment of an agent in the state upon whom process in actions against it may be brought. See N. Y. Code Civ. Proc. §§ 401, 432, subd. 2.

cause of action accrues against a person, he be out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state.”¹² But by the overwhelming weight of authority it is held that when a foreign corporation does business in a state and has an agent in the state openly exercising his authority as such, the corporation is within the intent of the statute of limitations and the corporation may claim the benefit of the statute.¹³ While the Supreme Court of the United States in applying

¹² *Williams v. Metropolitan St. R. Co.*, 68 Kan. 17, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6, 74 Pac. 600, quoted with approval in *Ball Engine Co. v. Bennett Co.*, 98 Neb. 290, 152 N. W. 550, but disapproved in *Tiller v. St. Louis & S. F. R. Co.*, 189 Fed. 994.

A corporation resides “beyond the limits” of a foreign state within the meaning of a statute of such state saving causes of action in favor of persons residing beyond the limits of the state when the statute was enacted. *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248.

¹³ *United States. United States Exp. Co. v. Ware*, 20 Wall. 543, 22 L. Ed. 422; *Baltimore & O. R. Co. v. Reed*, 223 Fed. 689; *Tiller v. St. Louis & S. F. R. Co.*, 189 Fed. 994; *Taylor v. Union Pac. R. Co.*, 123 Fed. 155; *Southern Ry. Co. v. Mayes*, 113 Fed. 84; *McCabe v. Illinois Cent. R. Co.*, 13 Fed. 827. See *Norris v. Atlas Steam-Ship Co.*, 37 Fed. 426.

Alabama. Huss v. Central Railroad & Banking Co., 66 Ala. 472.

Arizona. Work v. United Globe Mines, 12 Ariz. 339, 100 Pac. 813, aff’d 231 U. S. 595, 58 L. Ed. 389.

California. Lawrence v. Ballou, 50 Cal. 258.

Illinois. Pennsylvania Co. v. Sloan, 1 Ill. App. 364.

Iowa. Wall v. Chicago & N. W. R. Co., 69 Iowa 498, 29 N. W. 427.

Minnesota. St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, 48 N. W. 17.

Montana. King v. National Mining & Exploration Co., 4 Mont. 1, 1 Pac. 727.

North Carolina. Bennett v. Western U. Tel. Co., 152 N. C. 671, 68 S. E. 202; *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 21 Ann. Cas. 623, 68 S. E. 200, rev’g on rehearing 152 N. C. 34, 67 S. E. 42, and holding *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 1 L. R. A. (N. S.) 305, 111 Am. St. Rep. 778, 51 S. E. 887, to have been not well decided, and approving *Williams v. Iron Belt Building & Loan Ass’n*, 131 N. C. 267, 42 S. E. 607.

North Dakota. Colonial & United States Mortg. Co. v. Northwest Thresher Co., 14 N. D. 147, 70 L. R. A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160, 103 N. W. 915.

Tennessee. Turcott v. Yazoo & M. V. R. Co., 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067.

Texas. Ross v. Kansas City Southern R. Co., 34 Tex. Civ. App. 586, 79 S. W. 626; *Thompson v. Texas Land & Cattle Co. (Tex. Civ. App.)*, 24 S. W. 856.

Vermont. Hall v. Vermont & M. R. Co., 28 Vt. 401.

Virginia. Connecticut Mut. Life Ins. Co. v. Duerson’s Ex’r, 28 Gratt. 630.

West Virginia. Abell v. Penn Mut. Life Ins. Co., 18 W. Va. 400.

The Court of Civil Appeals of Texas in holding that an alien corporation doing business in that state

the statute of limitations to an action against a foreign corporation

under the laws thereof, and having two officers who were resident citizens of the state, upon whom service could be and was obtained, is a resident of the state so far as being entitled to plead the statute of limitations is concerned, said, in *Thompson v. Texas Land & Cattle Co.* (Tex. Civ. App.), 24 S. W. 856: "If the corporation can be sued in Texas, it can make any and all defenses permitted to anyone under our law; and, unless there was a new promise that would take the matter out of the operation of the statute, the claim was effectually barred by limitation. It is true that in New York it has been held that a foreign corporation could not plead the statutes of limitations because it was absent from the state, but we fail to see the cogency of the reasons given for the opinions so holding, and we know of no other American state, except perhaps Nevada, that coincided with this construction of statutes of limitation. The Supreme Court of the United States with a divided court sustained an opinion on the New York court on this point, on the ground that state courts have the right to construe their own statutes; but in the opinion of the majority of the judges it is intimated that it is on this point alone that the ruling is sustained, and Mr. Justice Miller, in a dissenting opinion, says: 'Nor do I believe that the courts of any state of the Union, except New York, have ever held that a person doing business within the state, and liable at all times to be sued and served personally with process, cannot avail himself of the statute of limitations if the time prescribed by it to bar such action has elapsed before it was commenced. The liability to suit where process can at all times be served must, in the nature of things,

be the test of the running of statutes.' Justice Strong concurred in this dissenting opinion, and we think it the reasonable view of the question *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137. In the case of *Railway Co. v. Pennsylvania*, 21 Wall. 492, it was held that the Pennsylvania court was authority in its state where it holds to a theory antagonistic to the New York idea. The corporation in this case does not, as contended by counsel for appellant, occupy the same position that a citizen of another state, or county does who is doing business in this state through an agency. Our view of the case is sustained by the Supreme Court of Texas in an opinion rendered by Judge Gaines. *Salt Co. v. Heidenheimer*, 80 Tex. 346, 15 S. W. 1038. The corporation, when it does business here, does it through its officials, and is here itself; and while it may be a citizen of another state, may be a resident of this state. It would not be contended that a foreigner who resides in Texas could not plead the statutes of limitations or any other defense in the absence of a statute curtailing his rights, and we see no reason why a foreign corporation that can be sued in our courts should not have the same privileges. The only reason that can be assigned for the provision in the statute causing the running of limitation to cease during absence from the state is because the party is beyond the reach of the courts, and whenever the person or corporation can be reached by personal service the reason of the rule ceases, and not more so in the case of an individual than in that of a corporation."

In *Colonial & United States Mortg. Co. v. Northwest Thresher Co.*, 14 N. D. 147, 70 L. R. A. 814, 116 Am. St.

follows the construction placed upon such statute by the highest

Rep. 642, 8 Ann. Cas. 1160, 103 N. W. 915, the court said: "The respondent contends that the statute does not run in favor of a foreign corporation, even though it has been continuously doing business in this state, and though it could at all times have been personally served with process within this jurisdiction. The weight of authority is against respondent's contention. * * * The courts of New York, Wisconsin, and Nevada hold that a foreign corporation is incapable of being present in a state other than that under whose laws it exists, and hence, under all circumstances, a foreign corporation is absent from all other states than that of its domicile. Consequently those courts hold that a foreign corporation comes within that provision of the statute of limitations which excepts absentees from its operation. *Olcott v. Railway Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Rathbun v. Railway Co.*, 50 N. Y. 656; *Larson v. Aultman & Taylor Co.* (Wis.), 56 N. W. 915, 39 Am. St. Rep. 893; *Insurance Co. v. Fricke* (Wis.), 74 N. W. 372, 41 L. R. A. 557; *State v. Society* (Wis.), 79 N. W. 220; *Robinson v. Imperial, etc., Co.*, 5 Nev. 44. In our opinion, the rule adopted by the majority of the courts is the sound one—that a corporation, although created by the laws of another state, should be deemed to be present in this state, and entitled to the protection of the statute of limitations, if it has been regularly engaged in doing business in this state, and has had its agent or agents here, and been amenable to personal service of the process of our courts."

Under statutes providing that service of process in actions against corporations may be made on any trustee or officer thereof or any agent employed in the general management of

its business, and that the time during which a defendant is a nonresident of the state shall not be included in computing any period of limitation, it is held in Iowa that the running of the statute of limitations does not depend upon the plaintiff's knowledge or lack of knowledge of the existence of an agent in the state upon whom process may be made, but upon the fact of the residence of the defendant in the state in such a sense that service of process could be made upon it, and that if it be to that extent a resident, the statute will run in its favor, regardless of the fact of the plaintiff's lack of knowledge of such residence. *Winney v. Sandwich Mfg. Co.*, 86 Iowa 608, 18 L. R. A. 524, 53 N. W. 421.

Under such a statute it was held that a foreign railroad corporation could avail itself of the defense of the statute of limitations, for the reason that, though the corporation was a resident of another state, yet it had a residence in the state for the purpose of being at any time served with process and made amenable in the courts of the state. *Wall v. Chicago & N. W. Ry. Co.*, 69 Iowa 498, 29 N. W. 427. But in a later case (*Winney v. Sandwich Mfg. Co.*, 86 Iowa 608, 18 L. R. A. 524, 53 N. W. 421), a distinction was drawn between such a corporation and a corporation, for instance a manufacturing corporation, engaged in business in the state and not having at all times in the state an agent upon whom process may be served, and that in the latter case the corporation could not avail itself of the statute of limitations. The court, in the latter case, in holding that it was not erroneous to charge the jury that a foreign corporation could set in operation in its favor the statute of limitations by establishing an office

tribunal of the state in which such action is pending, it is the holding of such court that, in the absence of a construction of a statute providing that the statute of limitations does not run if, when the cause of

or agency in the state, and that such corporation could accomplish the same purpose by having a general agent located in the state if the plaintiff knew, or by the exercise of ordinary prudence might know that such agent was located in the state, said: "Without in any way impairing the force of that decision, we may say that we are not inclined to apply the rule there laid down to foreign corporations generally. A railroad company is of necessity obliged to operate its road. It must always have officers and agents in the state where its road is situated, in order to carry on its business. By our statutes it may be brought within the jurisdiction of our courts by service of process upon its general agent anywhere in this state; also process may be served on its station, ticket, or any other agent, or on any trustee or officer. Code, §§ 2611, 2612. In such cases, then, service of process may always be had on the corporation within the state. Not so in the case at bar. Here is a manufacturing corporation. It may establish an office or agency, and, if it does, process may be served in certain cases upon the agent or clerk employed therein. It may have a general agent in the state, in which case process may be served upon him. It may, however, carry on its business without either establishing an office or agency in the state, or having a general agent therein. Surely, in such a case, it would hardly be contended that the corporation was a resident of the state so as to be served with process; hence it could not avail itself of the defense of the statute of limitations. If appellant's theory is good, a foreign corporation can, at its pleasure, and for

its own benefit, put in motion the statute. We do not think such result was ever anticipated by the legislature when it enacted the statute we have quoted. A foreign corporation, whose business in this state is such that it is not incumbent upon it to put itself in position to be at all times subject to the service of process, ought not to be permitted to shield itself behind the statute of limitations, because it may at some time or times (perhaps unknown to one having a cause of action against it) have an agent in this state upon whom process could be served. There is a wide distinction between the case of a railroad company, whose officers or agents may always be found within the state, and can readily be reached with process, and a foreign manufacturing corporation, having perhaps a general agent in this state, who may have no settled abiding place, whose relations to the party he serves are not generally known to the public, and the knowledge of whose coming and going must of necessity be limited to a few individuals. This question, so far as it relates to an office or agency in the state by an individual residing in another state, was mentioned, but not decided, in *Bellow v. Litchfield* (Iowa), 48 N. W. Rep. 1062. In the view we have taken, appellant not being entitled to avail itself of the defense of the statute of limitations, it was not prejudiced by the giving of the sixth and eighth instructions in so far as they referred thereto."

When a foreign corporation has become a "resident" by coming into the state, the statute applies. *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364.

action accrued, the defendant is out of the state, and does not begin to run until the defendant comes within the state so that he may be served with process, the statute of limitations begins to run as against a foreign corporation from the time when it has an agent in the state upon whom process can be made.¹⁴ A foreign corporation having a managing agent exercising his authority as such in the state is not "absent from the state" so as to prevent the running of the statute of limitations or deprive it of the benefit of the statute.¹⁵ A foreign corporation operating a line of railway through the state and doing business therein is not a nonresident of the state within the meaning of a statute providing that the period of absence shall not be computed in any of the periods of limitation.¹⁶

"Absence from the state" and "residence out of the state," in the sense of a statute providing that if the person against whom a cause of action has accrued shall be absent from or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action, mean such absence and such nonresidence as renders it impracticable at all times to obtain service of process, so that while a corporation's technical legal residence may be where it was created, its residence and status for purposes of suit will be where it can

¹⁴ *United States Exp. Co. v. Ware*, 20 Wall. (U. S.) 543, 22 L. Ed. 422, construing an Iowa statute.

¹⁵ *Lawrence v. Ballou*, 50 Cal. 258; *King v. National Mining & Exploring Co.*, 4 Mont. 1, 1 Pac. 727; *Turcott v. Yazoo & M. V. R. Co.*, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067. See also *Bank of Tennessee v. Armstrong*, 12 Ark. 602; *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060 (distinguishing the above cases, and also *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99); *Faulkner v. Delaware & R. Canal Co.*, 1 Denio (N. Y.) 441. Compare, however, *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157; *Rathbun v. Northern Cent. R. Co.*, 50 N. Y. 656; *Olcott v. Tioga R. Co.*, 20 N. Y. 210, rev'd 26 Barb. 147, 75 Am. Dec. 393; *Robeson v. Central R. Co.*, 76 Hun (N. Y.)

444, 28 N. Y. Supp. 104; *Mallory v. Tioga R. Co.*, 3 Abb. Dec. (N. Y.) 139, 42 N. Y. 354; *Thompson v. Tioga R. Co.*, 36 Barb. (N. Y.) 79.

A foreign corporation which had complied with the laws of Arizona, governing such corporations and authorizing them upon such compliance to own real property in the state, and which was continuously engaged in doing business therein during the entire period required to bar action to quiet title to realty, and during all that time had a resident agent there upon whom process could be served, can avail itself of the statute of limitations of Arizona and acquire title to real estate therein by adverse possession. *Work v. United Globe Mines*, 12 Ariz. 339, 100 Pac. 813, aff'd 231 U. S. 595, 58 L. Ed. 389.

¹⁶ *Baltimore & O. R. Co. v. Reed*, 223 Fed. 689.

through its officers and agents, be reached with process.¹⁷ It is held

¹⁷ See § 398, *supra*.

In *Turecott v. Yazoo & M. V. R. Co.*, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067, the court said: "Unquestionably, the residence of a corporation is the state of its creation. * * * And, if we should give the statute a strict literal construction it might be held that a foreign corporation was not entitled to the benefit of the limitation. Still the courts will not permit the literalism of the statute to thwart its obvious purpose, intent, and meaning. A thing may be within the letter of the statute, yet not within its operation, if not so intended. * * * We think the true rule is laid down in *Murfree on Foreign Corporations*, and that the rule as thus laid down is based on sound reason and principle. In speaking of such foreign corporation pleading the statute of limitations (section 247), it is said: 'As to the question whether a foreign corporation, when sued, can plead the bar of the statute in defense, it may be said that the great weight of authority is in favor of the conclusion suggested above, that the true test of the running of the statute is the liability of the party invoking its bar to the service of process during the whole of the period prescribed; that, if the operations of the company within the jurisdiction were such as to render it liable to suit, then it may plead the statute. The principles upon which this doctrine rests have nowhere been more effectively expressed than in the decision of the Illinois Appellate Court in *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364. Said Pleasants, J. (who delivered the opinion of the court); after referring to a number of cases holding that a corporation must be considered an inhabitant of the state by which it is

created: "We should have no hesitation in approving these applications of the doctrine if there were no other element in the cases bearing on the question than the origin and nature of the corporation, for it is true that a positive law can never, of its own force, and ordinarily does not otherwise, operate beyond the territorial limits of the power by which it is enacted; and hence, unless it is otherwise enabled, a corporation must, indeed, dwell in the place of its creation, and cannot migrate into another sovereignty. But the law of one state may have operation for certain purposes in another by the comity or permission of the latter, and we see no insuperable difficulty in the way of such migration, provided the former does not positively forbid, and the latter does positively consent. It is conceded that with such consent they lawfully may, as they often actually do, remove their officers, agents, offices, and effects into another sovereignty, and there exercise their functions and franchises. In such a case, where is the corporation? If it be said that it still dwells in the place of its creation, and is acting elsewhere only by agents, the answer is no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property, or its operation. Where these are, then, it seems most accordant with substantial fact and reason to say there is the corporation. Where these are not, we know of no means by which process can be served upon it; and, if there be none, that fact would seem to be conclusive upon the question of residence for the time being, at least for purposes of judicial jurisdiction." In *Montana* it was held that the fact that a foreign company had subjected

by some courts that a foreign corporation is immune from the penalty attached to "being out of the state" or "residing out of the state" only when it has complied with the requirements of the statute relative to its doing business in the state,¹⁸ especially when noncompliance

itself to a penalty by failing to file its charter or act of incorporation as required by the statute, though such failure did not disqualify it from being sued, did not thereby lose the right to plead the statute.' * * * We are aware that New York, Nevada, Kansas, and possibly other states do not follow this rule. It is said that such holding raises a discrimination against individuals and in favor of corporations. The argument is that individuals cannot claim the exemption when they are out of the state or are nonresidents, and it would be inequitable to allow corporations out of the state or nonresidents to claim it. But this apparent difference arises out of the fact that individuals out of the state, or residing out of it, cannot be reached by process against a resident agent while a corporation can, so that in the one case suit cannot be brought and in the other it may. Absence from the state and residence out of the state, in the sense of the statute, means such absence and such nonresidence as render it impracticable at all times to obtain service of process; so that, while a corporation's technical legal residence may be where it was created, its residence and status for purposes of suit will be where it can, through its officers and agents, be reached with process. While a corporation may reside beyond the state, and be out of the state, still it may, through its officers and agents, subject itself to the jurisdiction of the courts of the state. It may sue and be sued in a jurisdiction foreign to its technical residence."

A foreign corporation is not a "person" out of the state and for that

reason excepted from the operation of the statute as to actions against it while so absent. *Faulkner v. Delaware & R. Canal Co.*, 1 Denio (N. Y.) 441. But an act extending for a time the right to sue to "all persons who reside beyond the limits of the state" was held to include it. *Clarke v. Bank of Mississippi*, 10 Ark. 516, 52 Am. Dec. 248.

¹⁸ *O'Brien v. Big Casino Gold Min. Co.*, 9 Cal. App. 283, 99 Pac. 209; *Graham v. Brown Bros. Co.*, 30 Idaho 651, 168 Pac. 9; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 N. Y. App. Div. 205, 108 N. Y. Supp. 704; *Garrett v. Locke Regulator Co.*, 167 N. Y. Supp. 64; *St. Louis & S. F. R. Co. v. Keiffer*, 48 Okla. 434, 150 Pac. 1026; *Oklahoma Nat. Bank v. Chicago, R. I. & P. R. Co.*, 45 Okla. 707, 146 Pac. 716; *Hale v. St. Louis & S. F. R. Co.*, 39 Okla. 192, L. R. A. 1915 C 544, Ann. Cas. 1915 D 907, 134 Pac. 949. See also *Pierce v. Southern Pac. Co. (Cal.)*, 47 Pac. 874.

In *O'Brien v. Big Casino Gold Min. Co.*, 9 Cal. App. 283, 99 Pac. 209, the court said: "Foreign corporations, when attempting to claim the benefit of our statute of limitations, are required, as a necessary prerequisite to the exercise of that right, to not only meet the demands of the law by virtue of which alone they may avail themselves of the privilege of transacting business in this state, but must prove the fact at the trial. Omission to make such 'proof' is * * * fatal to their right to claim the benefit of the statute."

A contrary view was taken, however, in *Turcott v. Yazoo & M. V. R. Co.*, 101 Tenn. 102, 40 L. R. A. 768, 70 Am. St. Rep. 661, 45 S. W. 1067,

with the requirements in question precludes it from being reached by process.¹⁹

A foreign corporation doing business in a state and maintaining an agent therein upon whom process against the corporation may at all times be served is not a "nonresident" of the state within the

where it was held, under a statute providing that if the person against whom a cause of action has accrued shall be absent from or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action, that a foreign corporation defendant can plead and rely upon such statute when it has an office and agent in the state subject to continuous service of process, and that its failure to file and register its charter as required by a statute of the state in order that it may lawfully do business in the state and as a condition to its enjoying all of the rights of a domestic corporation does not affect its status as a resident of such state for the purpose of pleading the statute of limitations. The court said: "Nor do we think the failure to comply with the Act of 1891 (chapter 122) will preclude this foreign corporation from setting up the statute. It would not be a proper construction of that statute to hold that a corporation actually doing business in the state without complying with the statute could not be sued for a tort committed; and, having been impleaded upon the ground of a tort, it cannot be that the failure to comply with that statute must preclude it from making any defense, for it logically follows that, if it cannot make this defense, because of its failure it can make no other. The scope and purpose of that act were to require corporations to file and register their charters in order that they might do business, own or acquire property, and be enabled to sue; but it was never intended to ex-

empt them from suit if they disregarded the statute, nor to estop them from making defense if so sued; otherwise their property might be taken from them, and they estopped to defend. This company was in the state, owning property and doing business, before the act was passed and, while this did not exempt it from a compliance with the act in order that it might have all the rights of a domestic corporation, at the same time it was not the purpose nor the proper construction of that act that its property should be taken from it, or its right to defend actions brought against it should be cut off by its failure to comply with it."

Where the statute requires a foreign corporation, doing business in the state, to keep therein an office and an agent on whom service may be obtained, a foreign corporation, permitted to do business in the state and complying with such statute is not a nonresident within the meaning of the statute of limitations. *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 86 S. W. 150.

¹⁹ *Johnson & Larimer Dry Goods Co. v. Cornell*, 4 Okla. 412, 46 Pac. 860.

Thus it is held in Oklahoma that the statute of limitations does not run in favor of a nonresident corporation which neglects and refuses to comply with the laws of the state regulating its right to do business therein, as a result of which neglect and refusal persons having claims against the corporation are precluded from obtaining service of process upon it. *Johnson & Larimer Dry Goods Co. v. Cornell*, 4 Okla. 412, 46 Pac. 860.

meaning of a statute requiring actions founded on injuries to the person or reputation to be commenced within a certain period after their causes accrue, and providing that "the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitation."²⁰ In like manner a corporation doing business in, and amenable to the courts of, a foreign state must be deemed a resident of such state, so far as being entitled to plead the statute of limitations is concerned, and not a nonresident within the meaning of a statute providing that "the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitations prescribed."²¹

The appointment by a federal court of a receiver for a resident corporation does not make such corporation a nonresident so as to prevent the running of limitations in its favor.²²

In some jurisdictions, it is provided by statute that a foreign corporation may avail itself of the statute of limitations where it has complied with certain statutory requirements, or shall be denied the benefit of the statute where it has failed to comply with such requirements.²³ Under a statute requiring every foreign corporation within

²⁰ *McCabe v. Illinois Cent. R. Co.*, 13 Fed. 827, distinguishing *Tioga R. R. v. Blossburg & C. R. R.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331, and citing with approval *United States Exp. Co. v. Ware*, 87 U. S. 543, 22 L. Ed. 422, and *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493; *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Cobb, Blasdel & Co. v. Illinois Cent. R. Co.*, 38 Iowa 601.

²¹ *Wall v. Chicago & N. W. R. Co.*, 69 Iowa 498, 29 N. W. 427. See also *Baltimore & O. R. Co. v. Reed*, 223 Fed. 689; *Tiller v. St. Louis & S. F. R. Co.*, 189 Fed. 994; *Taylor v. Union Pac. R. Co.*, 123 Fed. 155; *Southern Ry. Co. v. Mayes*, 113 Fed. 84.

²² *Fowler v. Des Moines & K. C. Ry. Co.*, 91 Iowa 533, 60 N. W. 116. See *Lehigh Coal & Navigation Co. v. Central R. Co.*, 42 N. J. Eq. 591, 8 Atl. 648, for effect of receivership to toll statute where receiver is substituted as defendant.

²³ See *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060; *Graham v. Brown Bros. Co.*, 30 Idaho 651, 168 Pac. 9; *Comey v. United Surety Co.*, 217 N. Y. 268, Ann. Cas. 1917 E 424, 111 N. E. 832; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 N. Y. App. Div. 205, 108 N. Y. Supp. 704.

By statute in New York it is provided that a foreign corporation may plead the statute of limitations when it has complied with the statute providing for the appointment of an agent in the state upon whom process in actions against it may be served. See N. Y. Code Civ. Proc. §§ 401, 432, subd. 2. See also *Comey v. United Surety Co.*, 217 N. Y. 268, Ann. Cas. 1917 E 424, 111 N. E. 832; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 App. Div. 205, 108 N. Y. Supp. 704.

Where a foreign corporation applies for and receives from the secretary of state a certificate of authority to do business in the state, it is entitled

a certain period from the time of commencing to do business in the state to designate some person residing in the county in which the principal place of business is, upon whom service of process may be made, and file such designation in the office of the secretary of state, and providing as a penalty for the failure of such a corporation to make and file such certificate, it "shall be denied the benefit of the laws of this state limiting the time for the commencement of civil actions," it was held that such statute was prospective in its operation, and under well-recognized rules of statutory construction would entitle the defendant to only such benefit as might accrue after the filing of the designation, and that it was not intended that upon the filing by a foreign corporation of a designation after an action had commenced against it, the statute of limitations should be available to it.²⁴ In those jurisdictions where a foreign corporation may avail itself of the statute of limitations, it is held that to entitle it to the benefit of such statute, it must affirmatively appear from the pleadings that it maintained an agent upon whom service of process could be made within the state whose statute of limitations ran and barred the cause of action.²⁵ Whether or not a foreign corporation, entitled to assert

to plead the statute of limitations, as if it were a domestic corporation. *Comey v. United Surety Co.*, 217 N. E. 268, Ann. Cas. 1917 E 424, 111 N. E. 832; *Burke v. Galveston, H. & H. R. Co.*, 173 N. Y. App. Div. 221, 159 N. Y. Supp. 379; *Wehrenberg v. New York, N. H. & H. R. Co.*, 124 N. Y. App. Div. 205, 108 N. Y. Supp. 704.

Where a statute provides that non-residents shall not be entitled to the benefit of the statute of limitations, but excepts from its application foreign corporations while a designation of an office and an agent for the service of process within the state as prescribed by statute remains in force, it is held that where a foreign corporation had designated an agent for the service of process prior to the accrual of the cause of action and a certain place as his office or residence and after such accrual and before the expiration of the period of time prescribed by the statute as a bar to the action, he left the state and was ab-

sent therefrom for nearly a year, and did not return to the place designated by the corporation, and the designation was not renewed, the action was not barred. *Norris v. Atlas Steam-Ship Co.*, 37 Fed. 426, construing N. Y. Code Civ. Proc. § 432.

²⁴ *Black v. Vermont Marble Co.*, 1 Cal. App. 718, 82 Pac. 1060.

²⁵ *Taylor v. Union Pac. R. Co.*, 123 Fed. 155. See however *Baltimore & O. R. Co. v. Reed*, 223 Fed. 689.

To entitle a foreign corporation to claim the benefit of the statute of limitations on the ground that during the entire period since the cause of action arose it has done business in the state and had within the state an agent upon whom service of process could be made, such fact must be pleaded, for while the presumption may exist that a corporation organized under the laws of a given state has a legal habitation there and that service of process could be made within the state, no such presumption

the bar of the statute of limitations of the state when it has been doing business therein and has maintained an agent therein upon whom process might have been served, has maintained such an agent during the period prescribed by such statute of limitations is a question of fact to be submitted to the jury.²⁶

When a foreign corporation has been continuously a nonresident of a state, and beyond the reach of such process as will support a personal judgment, it cannot invoke the aid of the statute of limitations of such state.²⁷

Under a statute providing that "all actions or causes of action which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state," it is held that a transitory cause of action against a foreign corporation which arose in another state is, if barred by the statute of limitations of the latter state, barred by the laws of the former state.²⁸

arises as to a foreign corporation. *Taylor v. Union Pac. R. Co.*, 123 Fed. 155.

In *Baltimore & Ohio R. Co. v. Reed*, 223 Fed. 689, the court held that it would take judicial notice of the character and importance of a foreign railroad corporation and that it was a common carrier and would presume that it did business in the state, and consequently held that the statute of limitations was available to the defendant as a defense, even though it did not show that it could have been sued in the state, and the court refused to follow *Taylor v. Union Pac. R. Co.*, 123 Fed. 155, holding that to entitle a foreign corporation to the benefit of the statute of limitations on the ground that it had at all times had an agent within the state for service of process, such fact must be pleaded.

²⁶ *United States Exp. Co. v. Ware*, 20 Wall. (U. S.) 543, 22 L. Ed. 422; *Taylor v. Union Pac. R. Co.*, 123 Fed. 155.

Where a statute provides that the time of defendant's absence from the state is not to be computed, but in

case of a foreign corporation, if it has a managing agent in the state, service of the suit may be made upon such managing agent, it was held to be proper to charge the jury that if they found that the defendant had a managing agent in the state at the time the cause of action accrued, and if it had such agent in the state for the next five years thereafter, then the cause of action was barred; but otherwise it was not, or in other words, to bar the action the plaintiff must have been able, for five years before the suit was brought, to have sued the defendant in the state and compelled it to answer the suit by a service upon the managing agent therein. *United States Exp. Co. v. Ware*, 20 Wall. (U. S.) 543, 22 L. Ed. 422, quoted with approval in *McCabe v. Illinois Cent. R. Co.*, 13 Fed. 827.

²⁷ *Waterman v. A. & W. Sprague Mfg. Co.*, 55 Conn. 554, 12 Atl. 240; *Williams v. Iron Belt Building & Loan Ass'n*, 131 N. C. 267, 42 S. E. 607.

²⁸ *Taylor v. Union Pac. R. Co.*, 123 Fed. 155.

Where a foreign corporation is sued in a state, and it is urged as a defense

No laws of the several states have been more steadfastly or more often recognized by the Supreme Court of the United States from its beginning as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state and as construed by its highest court.²⁹ The construction given to a statute of a state in reference to the right of a foreign corporation to plead the statute of limitations by the highest tribunal of such state is regarded as a part of the statute, and is as binding upon a federal court sitting within such state as the text of the statute.³⁰ A holding by a state court that a foreign corporation is "out of the state," so far as pleading the statute of limitations is concerned, is conclusive on the Supreme Court of the United States on writ of error from that court.³¹ Nor will the rule be not followed because the highest court in the state has, in the opinion of the federal court, misconstrued its statute of limitations or adopted a rule of construction in conflict therewith.³² If the highest judicial tribunal of a state after having construed the statute of limitations adopts new views as to the proper construction of such a statute and reverses its former decisions, the federal courts will follow the latest settled adjudications.³³

that the cause of action was barred by the laws of the state by which the corporation was created, the plea or answer should set forth the statute of limitations of the latter state or else plead the substance thereof, and it is not sufficient merely to allege that the cause of action "did not accrue within six years before the commencement of the action." *Robeson v. Central R. Co. of New Jersey*, 76 Hun (N. Y.) 444, 28 N. Y. Supp. 104.

²⁹ *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 38 L. Ed. 953; *Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, 33 L. Ed. 940; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541; *Tioga R. R. v. Blossburg & C. R. R.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331; *Taylor v. Union Pac. R. Co.*, 123 Fed. 155.

³⁰ *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 38 L. Ed. 953; *Tioga R. R. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331; *Taylor v.*

Union Pac. R. Co., 123 Fed. 155.

³¹ *Tioga R. R. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331. See also *Hanchett v. Blair*, 100 Fed. 817; *Thompson v. Texas Land & Cattle Co., Ltd.* (Tex. Civ. App.), 24 S. W. 856.

³² *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 38 L. Ed. 953.

Where the courts of a state have decided that a foreign corporation cannot avail itself of the statute of limitations of that state, such decisions upon the construction of the statute are binding upon the federal courts, "whatever it may think of their soundness on general principles." *Tioga R. R. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331.

³³ *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 38 L. Ed. 953; *Leffingwell v. Warren*, 2 Black (U. S.) 599, 17 L. Ed. 261; *Green v. Neal*, 6 Pet. (U. S.) 291, 8 L. Ed. 402.

Although a state borrows its statute of limitations from a state which holds that under such statute a foreign corporation cannot avail itself of the statute of limitations, it will not be presumed that the act was adopted with the interpretation placed upon it by the courts of the state from which it was borrowed, as the question whether a corporation can or cannot be present in any state other than that under whose laws it was organized is a question rather of general law than of the interpretation of the statute.³⁴

As stated elsewhere in this work, when charged with notice through its officers and agents, the bar of laches may arise against the corporation, and this even though the statute of limitations is not complete.³⁵ The doctrine that a foreign corporation cannot, because of its nonresidence, avail itself of the statute of limitations, which does not run during nonresidence, is inapplicable to a defense based on laches.³⁶

§ 6018. Effect of dissolution of foreign corporation upon actions against it. The effect of the dissolution of a foreign corporation upon actions against it which are then pending and upon the right to bring suits against it has been considered fully elsewhere in this work.³⁷

XIX. SERVICE OF PROCESS ON FOREIGN CORPORATIONS

§ 6019. In general. The necessity of service of process upon a foreign corporation, or its voluntary appearance and submission to the jurisdiction of the courts of a state in which it is doing business has been adverted to elsewhere in considering the requisites to jurisdiction of the courts in suits against the corporation. It is now proposed to consider specifically the persons upon whom such service may be made and the methods of service and other incidents connected with the service of process against foreign corporations. As has been seen elsewhere, if a corporation has real or personal property in another state or country than that by which it was created, it may

³⁴ Colonial & United States Mortg. Co., Ltd., v. Northwest Thresher Co., 14 N. D. 147, 70 L. R. A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160, 103 N. W. 915.

³⁵ See § 2951, and the cases there cited.

³⁶ Kirby v. Lake Shore & M. S. R. Co., 14 Fed. 261; Forster v. Brown

Hoisting Machinery Co., 185 Ill. App. 528. See § 2951, *supra*.

Even the New York cases seem to have recognized that a corporation could plead laches, though it was foreign and could not plead limitations. Kirby v. Lake Shore & M. S. R. Co., 14 Fed. 261.

³⁷ See §§ 5808-5819, *supra*.

be proceeded against in such other state by an attachment of the property, for the proceeding is in rem, and it is not necessary that the court shall acquire jurisdiction of the corporation.³⁸ So, also, a foreign corporation may be subjected to garnishment proceedings in the state.³⁹

At common law the courts of a state or country cannot acquire jurisdiction of an action at law or suit in equity against a foreign corporation so as to render a personal judgment against it, and this by reason of the inability of the courts to issue such process as could compel these corporations to yield to the exercise of their jurisdiction.⁴⁰ This rule was founded upon the principle that the artificial,

³⁸ See §§ 3129, 3196-3197, *supra*.

See also the following decisions:
Colorado. Rocky Mountain Oil Co. v. Central Nat. Bank, 29 Colo. 129, 67 Pac. 153.

Delaware. Albright v. United Clay Production Co., 5 Pennew. 198, 62 Atl. 726.

Georgia. Wilson v. Danforth, 47 Ga. 676.

Louisiana. Martin v. Branch Bank of Alabama, 14 La. 415.

Massachusetts. Blackstone Mfg. Co. v. Inhabitants of Blackstone, 13 Gray 488; Ocean Ins. Co. v. Portsmouth Marine Ry. Co., 3 Mete. 420.

Michigan. Daniels v. Detroit, G. H. & M. R. Co., 163 Mich. 468, 128 N. W. 797.

Mississippi. Lamb v. Russell, 81 Miss. 382, 32 So. 916.

Pennsylvania. Solis v. Blank, 199 Pa. 600, 49 Atl. 302; Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 173.

South Carolina. Chitty v. Pennsylvania Ry. Co., 62 S. C. 526, 40 S. E. 944.

Tennessee. Union Bank v. United States Bank, 4 Humph. 369.

Vermont. Hawley v. Hurd, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401.

Virginia. Bank of United States v. Merchant's Bank, 1 Rob. 573.

Washington. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

³⁹ See § 3196, *supra*.

See also the following decisions:

Alabama. Louisville & N. R. Co. v. Steiner, 128 Ala. 353, 30 So. 741.

Arkansas. Choctaw Coal & Mining Co. v. Williams-Echols Dry Goods Co., 75 Ark. 365, 5 Ann. Cas. 569, 87 S. W. 632.

Minnesota. Krafe v. Roy & Roy, 98 Minn. 141, 116 Am. St. Rep. 346, 107 N. W. 966.

North Carolina. Goodwin v. Claytor, 137 N. C. 224, 67 L. R. A. 209, 107 Am. St. Rep. 479, 49 S. E. 173.

South Carolina. Erwin v. Southern R. Co., 71 S. C. 225, 50 S. E. 778.

West Virginia. Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975, 52 S. E. 465; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

⁴⁰ **United States.** Swarts v. Christie Grain & Stock Co., 166 Fed. 338; Merchants' Mfg. Co. v. Grand Trunk Ry. Co., 13 Fed. 358; Clarke v. New Jersey Steam Nav. Co., 1 Story 531, Fed. Cas. No. 2,859.

California. Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393.

Connecticut. Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

District of Columbia. Ambler v. Archer, 1 App. Cas. 94; Dallas v. Atlantic, M. & O. R. Co., 2 McArthur

invisible and intangible corporate body is exclusively the creature of the law, that it has no existence except by operation of the law and that, consequently, it has no existence without the limits of that sovereignty and beyond the operation of those laws by which it was

146; *Lathrop v. Union Pac. Ry. Co.*, 1 McArthur 234. See *Hoffman v. Washington-Virginia Ry. Co.*, 44 App. Cas. 418.

Illinois. *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170.

Indiana. See *Byers v. Union Cent. Life Ins. Co.*, 17 Ind. App. 101, 46 N. E. 475.

Massachusetts. *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Andrews v. Michigan Cent. R. Co.*, 99 Mass. 534, 97 Am. Dec. 51; *Williston v. Michigan Southern & N. I. R. Co.*, 13 Allen 400; *Peckham v. North Parish in Haverhill*, 16 Pick. 274.

Michigan. *Grand Trunk Ry. Co. of Canada v. Wayne Circuit Judge*, 106 Mich. 248, 64 N. W. 17; *Newell v. Great Western Ry. Co. of Canada*, 19 Mich. 336.

Minnesota. *State v. District Court of Ramsey County*, 26 Minn. 233, 2 N. W. 698.

Missouri. *Latimer v. Union Pac. Ry.*, 43 Mo. 105, 97 Am. Dec. 378.

New Jersey. *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222, 25 N. J. L. 57.

New York. *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114, 20 Am. Rep. 513; *Oishie v. Pennsylvania R. Co.*, 117 App. Div. 110, 102 N. Y. Supp. 368; *Coolidge v. American Realty Co.*, 91 App. Div. 14, 86 N. Y. Supp. 318; *India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 656; *Barnett v. Chicago & L. H. R. Co.*, 4 Hun 114; *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 Misc. 624, 96 N. Y. Supp. 271; *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 Misc. 1, 90 N. Y. Supp.

836; *Travis v. Railway Educational Ass'n*, 33 Misc. 577, 68 N. Y. Supp. 893; *Whitehead v. Buffalo & L. H. Ry. Co.*, 18 How. Pr. 218; *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275, aff'd 4 How. Pr. 415; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5.

Oregon. *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Pennsylvania. *Phillips v. Burlington Library Co.*, 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; *Nash v. Evangelical Lutheran Church*, 1 Miles 78; *Bank of Virginia v. Adams*, 1 Pars. Eq. Cas. 534.

Wisconsin. *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

See §§ 6005-6008, *supra*.

“By the common law, process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty by whose laws it exists, and any authority for proceeding against it in any other manner must be conferred by statute of the state where the process is served.” *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756, citing *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222, and *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5.

Where a suit is brought by the agent of a foreign corporation against it for his commissions, and upon a check given to him therefor upon which payment had been refused, an Indiana court said: “At common law a corporation must be sued in such an action as this in the jurisdiction of its domicile. All statutes authorizing such suits elsewhere are in derogation

created and by whose power it exists.⁴¹ In other words it was held that the official functions of the agents and officers of a corporation do not accompany them into a jurisdiction other than that by which the corporation was created, so as to authorize the service of process in a foreign state or country upon them for the corporation.⁴² It

of the common law, and should not be extended beyond their manifest meaning." *Byers v. Union Cent. Life Ins. Co.*, 17 Ind. App. 101, 46 N. E. 475.

⁴¹ *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15.

See § 387, *supra*.

⁴² *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Bank of Virginia v. Adams*, 1 Pars. Eq. Cas. (Pa.) 534.

In *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15, *Beasley, C. J.*, said: "The rule rests upon a highly artificial reason, and, however technically just, is confined at this day in its application within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal; nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has then existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by its agents, as they may be in a case of a private individual, and that the corporation itself is not present, the answer is that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty that created it that it may within it.

Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has, no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the officers of the corporation within its own jurisdiction, not upon the corporation itself. Process cannot be served upon the officer of a corporation in a foreign jurisdiction, because he does not carry his official character and functions with him. And yet the officers and agents of corporations do carry their official character and functions with them into foreign jurisdictions, for the purpose of making contracts and transacting the business of the corporation. The seal of a corporation, its distinguishing badge, at the common law the only evidence of its contracts, may be taken by its officers and used within a foreign jurisdiction. Doubts were formerly entertained whether a corporation could make a contract or maintain an action out of its own jurisdiction, or whether its property could be attached in a foreign jurisdiction. These questions have been long since settled, either by judicial construction of legislative enactment, in accordance with the reason of the thing and the usage of the commercial world. Sound principle requires that while the powers of corporations are world wide, while for all practical purposes they may exist and act everywhere, the technical rule of the common law, that they exist only within the jurisdiction of the sovereignty which created them, should be applied

necessarily follows from such rule that in order to give the courts

only within its strictest limits, and not be suffered to defeat the obvious claims of justice. * * * The question now before the court is not upon the validity of the common-law principle; to that we adhere. The suit is brought upon a judgment recovered in the state of New York upon a contract made by the corporation in that state. The process in the original action was served, and the defendants' appearance effected in strict conformity with the mode prescribed by the laws of that state. It is admitted by the pleadings that the individual upon whom process was served, was president of the corporation when the contract was made and when the process was served. The simple inquiry is, whether the statute of the state of New York, which authorizes the service of process in the mode adopted in this case, is so unreasonable, so contrary to natural justice and the principles of natural law, that it ought not to be sanctioned. *Moulin v. Trenton Mutual Life & Fire Ins. Co.*, 25 N. J. Law, 57. By the comity universally acknowledged in the states of this Union and acted upon by the Supreme Court in the case of *Bank of Augusta v. Earle* (13 Pet. 519), corporations may send their officers and agents into other states, transact their business, and make contracts there; and in some instances the laws of the states prescribe the mode and terms upon which they may do so. I am not prepared to say, that if they choose to avail themselves of this privilege, natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the states whose comity they thus invoke. For

the purpose of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state. Any natural person who goes into another state carries along with him all his personal liabilities; and there is quite as much reason that a corporation which chooses to open an office and transact its business, or to authorize contracts to be made in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it, as to the interpretation of the contracts so made. But I am quite prepared to say, that where a corporation confines its business operations to the state which has chartered it, a law of another state, which sanctions the service of process upon one of its officers or members accidentally within its jurisdiction is unreasonable, and so contrary to natural justice and to the principles of international law that the courts of other states ought not to sanction it. In such a case, a president or other officer ought not to be considered as carrying his official character along with him. (*Moulin v. Trenton Mutual Fire & Life Ins. Co.*, 24 N. J. Law, 222, 233.) Upon general principles, and in the absence of statutory innovations, it is to be regarded as settled, in this state at least, that if a foreign corporation, at the time of the commencement of suit, does not do business, and has not any office or place of business in this state, the contract sued on not having been entered into in this state, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any other court of this state. Under such circumstances, the officers or agents of such foreign corporation, when they

of a state or country jurisdiction of actions against foreign corporations, the service of process on officers or agents of the corporation who may be within such state or country must be authorized by a statute of such state or country.⁴³ But corporations are not entitled under the Constitution of the United States to all the privileges and immunities of citizens in the several states. Any state may, therefore, within certain limitations heretofore adverted to,⁴⁴ prescribe the terms and conditions on which foreign corporations may act therein; and this power undoubtedly allows the state to prescribe the mode of service of process of its courts upon a foreign corporation doing business there.⁴⁵ And such statutes have been declared to be neither

come into this jurisdiction, do not bring with them their official character or functions and are not to be esteemed; out of the sovereignty by the laws of which the corporate body exists, the representatives for the purpose of responding to suits of law of such corporate body. This is the principle upon which the case of *Moulin v. Insurance Company*, 4 Zab. 222, is founded."

In *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143, it was said: "Alderson on Judicial Writs and Process (page. 202) says: 'Under the common law, jurisdiction could not be acquired over a foreign corporation by the service of process upon one of its officers. But under the statute a foreign corporation may be subjected to the jurisdiction of the courts of a state by personal service on the proper officer, and such service is equivalent to a personal service on a nonresident natural person. No attachment of property is necessary. This doctrine seems to rest on sound principle, and is sustained by the authorities.' *Barnett v. Railroad Co.*, 4 Hun (N. Y.) 114, reported in 6 *Thomp. & C.* 358; *Weymouth v. Washington, G. & A. Railroad Co.*, 1 *MacArthur* (D. C.) 19."

⁴³ *United States. Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338.

Connecticut. Middlebrooks v. Spring-

field Fire Ins. Co.; 14 *Conn.* 301.

District of Columbia. Ambler v. Archer, 1 *App. Cas.* 94; *Lathrop v. Union Pac. Ry. Co.*, 7 *D. C.* 111, 1 *MacArthur* 234; *Weymouth v. Washington, G. & A. R. Co.*, 1 *MacArthur* 19. See *Hoffman v. Washington-Virginia Ry. Co.*, 44 *App. Cas.* 418.

Massachusetts. Peckham v. North Parish in Haverhill, 16 *Pick.* 274.

Missouri. Latimer v. Union Pac. Ry. Co., 43 *Mo.* 105, 97 *Am. Dec.* 378.

New Jersey. Camden Rolling Mill Co. v. Swede Iron Co., 32 *N. J. L.* 15; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 *N. J. L.* 222, 25 *N. J. L.* 57.

New York. McQueen v. Middletown Mfg. Co., 16 *Johns.* 5.

Oregon. Aldrich v. Anchor Coal & Development Co., 24 *Ore.* 32, 41 *Am. St. Rep.* 831, 32 *Pac.* 756.

Pennsylvania. Phillips v. Burlington Library Co., 141 *Pa. St.* 462, 23 *Am. St. Rep.* 304, 21 *Atl.* 640; *Nash v. Evangelical Lutheran Church*, 1 *Miles* 78.

⁴⁴ See § 5752 et seq., *supra*.

⁴⁵ *Reyer v. Odd Fellows' Fraternal Acc. Ass'n of America*, 157 *Mass.* 367, 34 *Am. St. Rep.* 288, 32 *N. E.* 469, citing *Lafayette Ins. Co. v. French*, 18 *How. (U. S.)* 404, 15 *L. Ed.* 451. See also *Fireman's Ins. Co. v. Thompson*, 155 *Ill.* 204, 46 *Am. St. Rep.* 335, 40 *N. E.* 488; *Field v. Eastern Build-*

“unreasonable nor in conflict with any principle of public law,” and their purpose of compelling corporations which do business in a certain jurisdiction to submit to the domestic forum the questions arising therefrom is held to be “highly proper.”⁴⁶ The legislature of a state has the power to provide for service upon other officers, agents and representatives, and whether service upon any officers other than the principal or chief officer will be sufficient to bring the corporation into court is a matter to be determined by local law, subject, however, to requirement that it must be reasonable, and the service provided for should be only upon such agents as may properly be deemed representatives of the foreign corporation.⁴⁷

Owing to the early decisions in reference to the exemption of a foreign corporation from suit in a state or country other than that by which it was created, statutes have been passed in the several states subjecting a foreign corporation to suit in the state under certain conditions and providing for service of process upon it, but the liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.⁴⁸ Such modification of the rule has been asserted

ing & Loan Ass'n, 117 Iowa 185, 90 N. W. 717.

“It being entirely within the powers of each state to exclude foreign corporations, or to admit them within its borders upon conditions,” said the court in a New Jersey case, “each state has the power to prescribe a mode of service of process upon foreign corporations which will subject them to the jurisdiction of its courts, provided, of course, that such mode is not unreasonable or contrary to the principles of natural justice.” *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822.

⁴⁶ *Reyer v. Odd Fellows' Fraternal Acc. Ass'n of America*, 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. E. 469.

“A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and

reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises.” *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

⁴⁷ *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451; *Reeves v. Southern R. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913; *Bristol v. Brent*, 38 Utah 58, 110 Pac. 356.

⁴⁸ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; *National Condensed Milk Co. v. Brandenburg*, 40 N. J. L. 111; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 25 N. J. L. 57.

“Formerly a corporation did not act outside the sovereignty that created it, and within that, as a corporation

in the more recent cases in this country, on the ground that a corporation, by doing business in another state or country than that by which it was created, impliedly submits to the jurisdiction of its courts in litigation relating to such business, and may be regarded, for such purpose, as constructively present in its officer or agent representing it in such business, so that service upon such officer or agent is good service upon it.⁴⁹

On the question of the service of summons on alleged agents of foreign corporations the decisions are various and not at all in harmony in the different courts of the country. Like the different kinds of substituted service, this service upon corporations by service upon agents of a subordinate kind has grown up in recent years under particular statutes of states; and as the statutes are various, this is perhaps one reason for the differing decisions that are found in the reports.⁵⁰ It is uniformly recognized that when a person, corporate or natural, does place itself within the territorial limits of a state, jurisdiction over his or its person may be obtained to adjudicate personal liabilities to such extent as state statutes may authorize. So long as either maintains physical absence the state has no right to insist that they must submit questions of personal liability to its courts, but when they voluntarily come within the state, such immunity no longer exists.⁵¹

A judgment rendered against a foreign corporation without notice to it as prescribed by law is not due process of law and is void, being in contravention of the Fourteenth Amendment of the Constitution of the United States.⁵²

has to act by officers or agents, the statutes or rules of court provided for service upon such officers or agents. As the comity of different countries permitted corporations to act outside of the sovereignties which created them, there arose necessities, or apparent necessities, for bringing them within the jurisdiction of the courts of the state in which they did business, and that, as the occasion arose, was provided for by statutes." Boardman v. S. S. McClure Co., 123 Fed. 614.

⁴⁹ See § 6020, *infra*.

⁵⁰ Boardman v. S. S. McClure Co., 123 Fed. 614.

⁵¹ Fond du Lac Cheese & Butter Co.

v. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640; Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 15 L. R. A. (N. S.) 1045, 115 Am. St. Rep. 1063, 106 N. W. 821; Eingartner v. Illinois Co., 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664, and Curtis v. Bradford, 33 Wis. 190.

⁵² Blue Goose Min. Co. v. Northern Light Min. Co., 245 Fed. 727; King Tonopah Min. Co. v. Lynch, 232 Fed. 485; Southern Ry. Co. v. Simon, 184 Fed. 959; Gouner v. Missouri Valley Bridge & Iron Co., 123 La. 964, 49 So. 657.

See §§ 6030-6034, *infra*.

§ 6020. **Consent to prescribed manner of service implied from doing business in state.** "A state," it was said by Justice Field, "may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just, and such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process."⁵³ The same doctrine has been laid down in many cases, state and federal.⁵⁴ In other words, when a foreign corporation avails itself

⁵³ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

"Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it." Field, J., in *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, quoted with approval in *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

⁵⁴ **United States.** *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Smith v. Empire State-Idaho Mining & Development Co.*, 127 Fed. 462; *Central Grain & Stock Exchange of Hammond v. Board of Trade City of Chicago*, 125 Fed. 463; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259; *New River Mineral Co. v. Seeley*, 120 Fed. 193; *American Cotton Co. v. Beasley*, 116 Fed. 256; *Meyer v. Pennsylvania Lumbermen's Mut. Fire Ins. Co.*, 108 Fed. 169; *Christie v. Davis Coal & Coke Co.*, 92 Fed. 3; *Taylor v. Illinois Cent. R. Co.*, 89 Fed. 119; *Knapp, Stout & Co. Company v. National Mut. Fire Ins.*

Co., 30 Fed. 607; *United States v. American Bell Tel. Co.*, 29 Fed. 17; *Funk v. Anglo-American Ins. Co.*, 27 Fed. 336; *Moch v. Virginia Fire & Marine Ins. Co.*, 10 Fed. 696; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary 123, 1 Fed. 471.

Alabama. *Western U. Tel. Co. v. Pleasants*, 46 Ala. 641.

Arkansas. *Vulcan Const. Co. v. Harrison*, 95 Ark. 588, 130 S. W. 583; *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148; *American Casualty Co. v. Lea*, 50 Ark. 539, 20 S. W. 416.

California. *Thomas v. Placerville Gold Quartz Min. Co.*, 65 Cal. 600, 4 Pac. 641; *Lawrence v. Ballou*, 50 Cal. 258.

Colorado. *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325.

Delaware. *Caldwell v. Armour*, 1 Pennew. 545, 43 Atl. 517.

District of Columbia. *Weymouth v. Washington, G. & A. R. Co.*, 1 MacArthur 19.

Georgia. *Hawkins v. Fidelity & Casualty Co.*, 123 Ga. 772, 51 So. 724;

of the privileges of doing business in a state whose laws authorize it

Reeves v. Southern Ry. Co., 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; **Alabama Great Southern R. Co. v. Fulghum**, 87 Ga. 263, 13 S. E. 649; **City Fire Ins. Co. v. Carrugi**, 41 Ga. 660.

Iowa. **Sparks v. National Masonic Acc. Ass'n**, 100 Iowa 458, 69 N. W. 678.

Kansas. **St. Louis & S. F. Ry. Co. v. De Ford**, 38 Kan. 299, 16 Pac. 442; **North Missouri R. Co. v. Akers**, 4 Kan. 453, 96 Am. Dec. 183.

Louisiana. **Milwaukee Trust Co. v. Germania Ins. Co.**, 106 La. 669, 31 So. 298.

Maryland. **State v. Pennsylvania Steel Co. of Philadelphia**, 123 Md. 212, 91 Atl. 136; **Central of Georgia R. Co. v. Eichberg**, 107 Md. 363, 14 L. R. A. (N. S.) 389, 68 Atl. 690.

Massachusetts. **Reyer v. Odd Fellows' Fraternal Acc. Ass'n of America**, 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. E. 469; **Wilson v. Martin-Wilson Automatic Fire Alarm Co.**, 149 Mass. 24, 20 N. E. 318.

Michigan. **Emerson v. McCormick Mach. Co.**, 51 Mich. 5, 16 N. W. 182.

Minnesota. **Atkinson v. U. S. Operating Co.**, 129 Minn. 232, 152 N. W. 410; **Armstrong v. New York Cent. & H. R. Co.**, 129 Minn. 104, 151 N. W. 917.

Missouri. **McNichol v. United States Reporting Agency**, 74 Mo. 457.

Nebraska. See **Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.**, 49 Neb. 537, 68 N. W. 929; **Klopp v. Creston City Guarantee Water Works Co.**, 34 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819.

New Hampshire. **Libbey v. Hodgdon**, 9 N. H. 394.

New Jersey. **Mercer v. Pennsylvania R. Co.**, 42 N. J. L. 490; **National Condensed Milk Co. v. Brandenburg**, 40 N. J. L. 111; **Moulin v. Trenton**

Mut. Life & Fire Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57.

New York. **Grant v. Cananea Consol. Copper Co.**, 189 N. Y. 241, 82 N. E. 191, rev'g 117 App. Div. 576, 102 N. Y. Supp. 642; **Tuchband v. Chicago & A. R. Co.**, 115 N. Y. 437, 22 N. E. 360; **Pringle v. Woolworth**, 90 N. Y. 502; **Pope v. Terre Haute Car & Manufacturing Co.**, 87 N. Y. 137; **Gibbs v. Queen Ins. Co.**, 63 N. Y. 114, 20 Am. Rep. 513; **Fisk v. Chicago, R. I. & P. R. Co.**, 53 Barb. 472; **Merchants' Mfg. Co. v. Grand Trunk Ry. Co.**, 63 How. Pr. 459; **Clews v. Rockford, R. I. & St. L. R. Co.**, 49 How. Pr. 117; **Quade v. New York, N. H. & H. R. Co.**, 39 N. Y. St. Rep. 157.

North Carolina. **Anderson-Oliver v. United States Fidelity & Guaranty Co.**, 174 N. C. 417, 93 S. E. 948; **Whitehurst v. Kerr**, 153 N. C. 76, 68 S. E. 913; **Shields v. Union Cent. Life Ins. Co.**, 119 N. C. 380, 25 N. E. 951.

North Dakota. **Foster v. Charles Betcher Lumber Co.**, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

Oregon. **Hamilton v. Northern Pac. S. S. Co.**, 84 Ore. 71, 164 Pac. 579; **Ramaswamy v. Hammond Lumber Co.**, 78 Ore. 407, 152 Pac. 223.

Pennsylvania. **Werron v. Metropolitan Life Ins. Co.**, 166 Pa. St. 112, 30 Atl. 1008; **Kennedy v. Agricultural Ins. Co.**, 165 Pa. St. 179, 30 Atl. 724; **Hagerman v. Empire State Co.**, 97 Pa. St. 534; **Bushel v. Commonwealth Ins. Co.**, 15 Serg. & R. 173.

South Carolina. **McSwain v. Adams Grain & Provision Co.**, 93 S. C. 103, Ann. Cas. 1914 D 981, 76 S. E. 117.

South Dakota. **Foster v. Charles Betcher Lumber Co.**, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

Tennessee. **Connecticut Mut. Life Ins. Co. v. Spratley**, 99 Tenn. 322, 44

to be sued there by service of process upon an agent, its assent to that mode of service is implied; and it consents to be amenable to suit by such mode of service as the laws of that state provide, when it invokes the comity of the state for the transaction of its affairs; and it waives the right to object to the mode of service of process which the state laws authorize.⁵⁵ The liability of a foreign corpora-

L. R. A. 442, 42 S. W. 145, aff'd 172 U. S. 602, 43 L. Ed. 569; Chicago & A. R. Co. v. Walker, 9 Lea 475.

Utah. Walker Bros. v. Continental Ins. Co. of New York, 2 Utah 331.

Vermont. Osborne & Woodbury v. Shawmut Ins. Co., 51 Vt. 278; Day v. Essex County Bank, 13 Vt. 97.

Virginia. Baltimore & O. R. Co. v. Gallahue's Adm'rs, 12 Gratt. 655, 65 Am. Dec. 254.

Wisconsin. State v. United States Mut. Acc. Ass'n, 67 Wis. 624, 31 N. W. 229.

"By numerous decisions, it is established as a part of the common law of this country that, where a state makes conditions upon which foreign corporations may do business, and provides a method whereby the courts of the state may acquire jurisdiction over them by service of process upon designated agents within the state, a foreign corporation, subsequently doing business in the state, is deemed to consent to the conditions, and to be bound by the service of process in the manner specified by the statute." *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

If a foreign corporation makes a contract in a state other than that by which it was created, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state. *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222, and *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111, quoted with approval in *Colorado Iron*

Works v. Sierra Grande Min. Co., 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325.

⁵⁵ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

"The presence of an individual defendant is a manifest fact. The presence of a corporation as an entity is not so manifest. It may in its charter of incorporation declare the place of its domicile and its residence, in the sense of its principal office or place of business. Its presence otherwise is not manifested, except by its officers or agents. Strictly speaking, a corporation does not migrate when its officers move into another jurisdiction. It would follow from this that it could be sued only in the state of its incorporation. It is a well-known fact, however, that many corporations do business in foreign jurisdictions. They can only do this with the consent, express or implied, of the state in which they are thus found. This consent may be given upon condition that they be amenable to process where their business is transacted. This condition may likewise be implied. Out of this we get the principle that foreign corporations may be sued where they are doing business, and process may be served upon the agent who there acts for and represents them. Such agent must not merely be in the jurisdiction, but he must also be there acting for the corporation. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222." *Dickinson, J.*, in *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

"A corporation chartered in one state, by doing business in another

tion to be sued in a particular jurisdiction in which it is doing business need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.⁵⁶ If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the state, are to be deemed to consent to such condition as fully as though they had specially authorized such agents to receive service of the process.⁵⁷ The manifest injustice which would ensue if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced almost all of the states, if not all, to provide by statute that a foreign corporation doing business in the state shall appoint an agent residing therein, upon whom process may be served in actions arising out of such business or upon contracts made in the state.⁵⁸

The Supreme Court of the United States has often held that wherever a statute providing that a foreign corporation doing business in

state, where, as a condition, expressed or implied, to its right to do business there, it must submit to be sued in the courts of such other state, waives the right to be sued in the place of its residence; the right of trial within the state, district, or county of one's residence being a privilege which may be waived. It is not necessary that such a condition to the right of doing business be expressly stated in the statute, though this is sometimes done. If there be a statutory provision for service of summons upon a foreign corporation by serving its officers or agents through which it is doing its business in the state where the transitory action is brought, then there is an implied condition that the corporation, while operating in such state, shall submit to the jurisdiction of its courts upon such service; and while it so does business by such officers or agents it waives thereby objection

to jurisdiction in personam, acquired by service on them. In such case, though the corporation resides in the state of its creation, it is 'found' in the state where it is so sued and served." *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 49 N. E. 291, 47 N. E. 947, quoted with approval in *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143.

⁵⁶ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964. See also *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099.

⁵⁷ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 49 Pac. 876; *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534; *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

⁵⁸ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

the state shall appoint an agent residing therein for service of process upon it exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the federal courts held within the state, but it has never held the existence of such a statute to be essential to the jurisdiction of the federal courts.⁵⁹

So long as a corporation confines its operations to the state within which it was created, it cannot be subjected to the jurisdiction of a court of another state in which it has no office or transacts no business by the service of process on some officer or agent while temporarily present in the latter state, because he cannot take the corporation with him beyond the jurisdiction of the state of its creation. But when it voluntarily goes into another state and by the express permission or acquiescence of such state engages in the transaction of its corporate business, it is liable to be brought into the courts thereof by service of process upon such officer or agent as the local laws may designate, and the judgment founded thereon will be held good everywhere unless the mode of acquiring jurisdiction violates the principles of natural justice. In short, when a corporation migrates into another state, and engages in business there, it becomes, in effect, for jurisdictional purposes, a domestic corporation, and liable to suit upon a cause of action arising in the state of its adoption by service of process in the manner provided for the service of domestic corporations, unless the statute otherwise provides.⁶⁰

§ 6021. Doing business essential to jurisdiction in personam. In the absence of voluntary appearance and submission to the jurisdiction, the courts of a state cannot acquire jurisdiction over persons not present in the state except for the purpose of adjudicating with reference to property or status located in the state. This is an inherent limitation upon the power and jurisdiction of the state under the form of government obtaining in the United States, and cannot be escaped

⁵⁹ *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Shaw v. Quincy Min. Co. (Ex parte Shaw)*, 145 U. S. 444, 36 L. Ed. 768; *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 146, 28 L. Ed. 379, 382; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451.

⁶⁰ *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308, 91 N. E. 1048, aff'g 148 Ill. App. 227; *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 643, 49 Pac. 876, citing *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Cunningham v. Klamath Lake R. Co.*, 54 Ore. 13, 101 Pac. 213, 1099. See also § 2956 et seq.

by reason of local statutes declaring such power.⁶¹ Hence although a statute may in terms authorize a suit against a foreign corporation whenever the plaintiff resides in the state and the summons can be served upon some officer or agent of the corporation, those statutes must be ineffective to give jurisdiction, unless the presence of such officer or agent within the borders of the state amounts to presence of the corporation, for it is undoubtedly possible for an individual who incidentally is officer of the corporation to come into the state in his personal capacity without bringing the corporation with him.⁶²

To give the local courts jurisdiction in personam in an action against a foreign corporation, it is essential that the corporation be doing business in the state or appear in the action.⁶³ The Supreme Court of

⁶¹ *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

⁶² *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

⁶³ *United States. Toledo Railways & Light Co. v. Hill*, 244 U. S. 49, 61 L. Ed. 982; *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *Riverside & D. River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. Ed. 910; *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915 B 77; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272; *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. Ed. 379; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Ex parte Schöllenberger*, 96 U. S. 369, 24

L. Ed. 853; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Vance v. Pullman Co.*, 160 Fed. 707; *Carpenter v. Willard Case Lumber Co.*, 158 Fed. 697; *Ladd Metals Co. v. American Min. Co., Ltd.*, 152 Fed. 1008; *Donovan v. Dixieland Amusement Co.*, 152 Fed. 661; *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008; *Smith v. Empire State-Idaho Mining & Development Co.*, 127 Fed. 462; *Earle v. Chesapeake & O. Ry. Co.*, 127 Fed. 235; *Central Grain & Stock Exchange of Hammond v. Board of Trade, City of Chicago*, 125 Fed. 463; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259; *Boardman v. S. S. McClure Co.*, 123 Fed. 614; *Barres v. Western U. Tel. Co.*, 120 Fed. 550; *American Cotton Co. v. Beasley*, 116 Fed. 256; *Doe v. Springfield Boiler & Manufacturing Co.*, 104 Fed. 684; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. 433; *Bentlif v. London & Colonial Finance Corporation, Ltd.*, 44 Fed. 667; *Clews v. Woodstock Iron Co.*, 44 Fed. 31; *Golden v. The Morning News of New Haven*, 42 Fed. 112; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802; *Carpenter v. Westinghouse Air-Brake*

the United States has laid down the following rule: "A foreign

Co., 32 Fed. 434; United States v. American Bell Tel. Co., 29 Fed. 17; Good Hope Co. v. Railway Barb Fencing Co., 22 Fed. 635.

Arkansas. Crane v. Hibbard, 66 Ark. 282, 50 S. W. 503.

California. Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270; Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393; Carpenter v. Bradford, 23 Cal. App. 560, 138 Pac. 946; Herron Co. v. Westside Elec. Co., 18 Cal. App. 778, 124 Pac. 455; Dickinson v. Zubiarte Min. Co., 11 Cal. App. 656, 106 Pac. 123.

Connecticut. Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

District of Columbia. Doremus v. National Cotton Improvement Co., 39 App. Cas. 295; Mitchell Min. Co., v. Emig, 35 App. Cas. 527; Ambler v. Archer, 1 App. Cas. 94; Lathrop v. Union Pac. Ry. Co., 7 D. C. 111; Dallas v. Atlantic, M. & O. R. Co., 2 MacArthur 146; Lathrop v. Union Pac. Ry. Co., 1 MacArthur 234.

Georgia. King v. Sullivan, 93 Ga. 621, 20 S. E. 76.

Illinois. Italian-Swiss Agr. Colony v. Pease, 194 Ill. 98, 62 N. E. 317, aff'g 96 Ill. App. 45; Midland Pac. R. Co. v. McDermid, 91 Ill. 170; Schilling Bros. Co. v. Henderson Brewing Co., 107 Ill. App. 335; Steele v. Schaffer, 107 Ill. App. 320; Galveston City Ry. Co. v. Hook, 40 Ill. App. 547.

Indiana. Rehm v. German Ins. & Sav. Institution, 125 Ind. 135, 25 N. E. 173; Rush v. Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143.

Iowa. Greaves v. Posner, 111 Iowa 651, 82 N. W. 1022; Locke v. Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49; Gross v. Nichols, 72 Iowa 239, 33 N. W. 653; Niagara Ins. Co. v. Rodecker & Pearson, 47 Iowa 162.

Kansas. J. B. Watkins Land-Mortgage Co. v. Elliott, 62 Kan. 291, 84

Am. St. Rep. 385, 62 Pac. 1004.

Maryland. Crook v. Girard Iron Co., 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94.

Massachusetts. Hopedale Mfg. Co. v. Clinton Cotton Mills, 224 Mass. 193, 112 N. E. 879; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206; Peckham v. North Parish in Haverhill, 16 Pick. 274.

Michigan. Newell v. Great Western Ry. Co. of Canada, 19 Mich. 336.

Minnesota. Lattu v. Ontario & Minnesota Power Co., 131 Minn. 162, 154 N. W. 950; Kendall v. Orange-Judd Co., 118 Minn. 1, 136 N. W. 291; North Wisconsin Cattle Co. v. Oregon Short Line R. Co., 105 Minn. 198, 117 N. W. 391; Wold v. J. B. Colt Co., 102 Minn. 366, 114 N. W. 243; State v. District Court Ramsey County, 26 Minn. 233, 2 N. W. 698.

Mississippi. Saxony Mills v. Wagner, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899; New Orleans, J. & G. N. R. Co. v. Wallace, 50 Miss. 244.

Missouri. Latimer v. Union Pac. Ry., 45 Mo. 105, 97 Am. Dec. 378; Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155; Zeinicker Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321.

New Hampshire. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 66 L. R. A. 574, 56 Atl. 465.

New Jersey. Roake v. Pennsylvania R. Co., 70 N. J. L. 494, 57 Atl. 160; Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15; Groel v. United Elec. Co. of New Jersey, 69 N. J. Eq. 397, 60 Atl. 822; Puster v. Parker Mercantile Co. (N. J. Eq.), 59 Atl. 232; Polhemus v. Holland Trust Co., 59 N. J. Eq. 93, 45 Atl. 534.

corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent.”⁶⁴

The courts of a state cannot acquire jurisdiction of an action at law or suit in equity against a foreign corporation, so as to render a personal judgment against it, unless the corporation comes within the

New Mexico. *Territory v. Baker*, 12 N. M. 456, 78 Pac. 624, aff'd *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540.

New York. *Krakowski v. White Sulphur Springs*, 174 App. Div. 440, 161 N. Y. Supp. 193; *McQueen v. Middleton Mfg. Co.*, 16 Johns. 5.

Ohio. *Riter-Conley Mfg. Co. v. Mzik*, 23 Ohio Cir. Ct. 164.

Oklahoma. *Title Guaranty & Surety Co. v. Slinker*, 42 Okla. 811, 143 Pac. 41.

Oregon. *Knapp v. Wallace*, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054; *Farrell v. Oregon Gold Min. Co.*, 31 Ore. 643, 49 Pac. 876; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 836, 32 Pac. 756.

Pennsylvania. *Phillips v. Burlington Library Co.*, 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; *Nash v. Evangelical Lutheran Church*, 1 Miles 78; *Bank of Virginia v. Adams*, 1 Pars. Eq. Cas. 534.

South Carolina. *Tillinghast v. Boston & P. R. Lumber Co.*, 38 S. C. 319, 17 S. E. 31, 725.

Texas. *Louisville & N. R. Co. v. Missouri, K. & T. R. Co. of Texas*, 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276; *Bradley v. Burnett* (Tex. Civ. App.), 40 S. W. 170.

Washington. *Rich v. Chicago, B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008; *Carsten & Earles v. Leidigh & Havens Lumber Co.*, 18 Wash. 450, 39 L. R. A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051.

Wisconsin. *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640; *Fitch v. Huntington*, 125 Wis. 204, 102 N. W. 1066; *Maxeey v. McCord*, 120 Wis. 571, 98 N. W. 529, 923; *Northwestern Iron Co. v. Central Trust Co.*, 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

⁶⁴ Mr. Justice Brandeis, in *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710, citing *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 488, Ann. Cas. 1915 B 77:

“The business done by a foreign corporation must be such in character and extent as to warrant the inference that it has subjected itself to the jurisdiction. *St. Louis S. W. Ry. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915 B 77. In the present case the plaintiff is seeking to bring suit upon a cause of action arising some time before, in connection with transactions in England, between the plaintiff and the defendant corporation. To hold that the defendant corporation may be sued in the United States, because the managing director took up certain business for it personally while traveling in this country, instead of conducting that business by letter, is impossible, under the authorities. The case of *St. Louis S. W. Ry. v. Alexander*, supra, presents an entirely different state of facts.” *Chatfield, J.*, in *Smithson v. Roneo*, 231 Fed. 349.

jurisdiction of the state, so that process may be served upon it or unless it voluntarily appears and submits to the jurisdiction. If a corporation is not doing any business in a state, service of process upon an officer or agent who happens to come into the state, whether on his own business or casually on business for the corporation is not service upon the corporation, and can give no jurisdiction as against it, for the officer or agent does not represent the corporation in such a case. And by the overwhelming weight of authority, this is true even when there obtains in such state a statute which authorizes service of process upon the officers or agents of foreign corporations.⁶⁵

⁶⁵ See generally § 6006, *supra*.

See also the following decisions:

United States. Toledo Railways & Light Co. v. Hill, 244 U. S. 49, 61 L. Ed. 982; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272; Kendall v. American Automatic Loom Co., 198 U. S. 477, 49 L. Ed. 1133; Remington v. Central Pac. R. Co., 198 U. S. 95, 49 L. Ed. 959; Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 49 L. Ed. 810; Caledonian Coal Co. v. Baker, 196 U. S. 432, 49 L. Ed. 540; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. Ed. 749; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113; Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964; Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699; Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; Golden, Belknap & Swartz v. Connersville Wheel Co., 252 Fed. 904; Atchison, T. & S. F. Ry. Co. v. Weeks, 248 Fed. 970; Carpenter v. Willard Case Lumber Co., 158 Fed. 697; Case v. Smith, Lineaweaver & Co., 152 Fed. 730; Donovan v. Dixieland Amusement Co., 152 Fed. 661; Green v. Chicago, B. & Q. R. Co., 147 Fed. 767; Jackson v. Delaware River Amusement Co., 131 Fed. 134; Martin v. New Trinidad Lake Asphalt Co.,

Ltd., 130 Fed. 394; Loudon Machinery Co. v. American Malleable Iron Co., 127 Fed. 1008; Earl v. Chesapeake & O. Ry. Co., 127 Fed. 235; Central Grain & Stock Exchange of Hammond v. Board of Trade City of Chicago, 125 Fed. 463; Scott v. Stockholders' Oil Co., 122 Fed. 835; American Locomotive Co. v. Dickson Mfg. Co., 117 Fed. 972; Revans v. Southern Missouri & A. R. Co., 114 Fed. 982; Conley v. Mathieson Alkali Works, 110 Fed. 730, *aff'd* 190 U. S. 428, 47 L. Ed. 1122; Reilly v. Philadelphia & R. Ry. Co., 109 Fed. 349; Rust v. United Waterworks Co., Ltd., 70 Fed. 129; United States Graphite Co. v. Pacific Graphite Co., 68 Fed. 442; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 850; Reifsnider v. American Imp. Pub. Co., 45 Fed. 433; Bentlif v. London & Colonial Finance Corporation, Ltd., 44 Fed. 667; Clews v. Woodstock Iron Co., 44 Fed. 31; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., 32 Fed. 802.

Alabama. Dozier Lumber Co. v. Smith-Isburg Lumber Co., 145 Ala. 317, 39 So. 714.

California. Eureka Mercantile Co. v. California Ins. Co., 130 Cal. 153, 62 Pac. 393; Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 369, 41 Pac. 308; Dickinson v. Zubiate Min. Co., 11 Cal. App. 656, 106 Pac. 123; Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289.

In a well considered federal case, the court said: "The decisions of

Connecticut. Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301.

District of Columbia. Doremus v. National Cotton Improvement Co., 39 App. Cas. 295; Ambler v. Archer, 1 App. Cas. 94; Lathrop v. Union Pac. Ry. Co., 7 D. C. 111; Weymouth v. Washington, G. & A. R. Co., 1 MacArthur 19.

Illinois. Midland Pac. Ry. Co. v. McDermid, 91 Ill. 170.

Louisiana. Southern Sawmill Co. v. American Hard Wood Lumber Co., 115 La. 237, 112 Am. St. Rep. 267, 38 So. 977.

Massachusetts. Peckham v. North Parish in Haverhill, 16 Pick. 274.

Michigan. Newell v. Great Western Ry. of Canada Co., 19 Mich. 336.

Minnesota. Lattu v. Ontario & Minnesota Power Co., 131 Minn. 162, 154 N. W. 950; North Wisconsin Cattle Co. v. Oregon Short Line R. Co., 105 Minn. 198, 117 N. W. 391; State v. District Court of Ramsey Co., 26 Minn. 233, 2 N. W. 698.

Mississippi. Saxony Mills v. Wagner & Co., 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899.

Missouri. Latimer v. Union Pac. Ry., 43 Mo. 105, 97 Am. Dec. 378; Zelnicker Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321.

Nebraska. Western Traders' Acc. Ass'n v. Taylor, 62 Neb. 783, 87 N. W. 950.

New Hampshire. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 66 L. R. A. 574, 56 Atl. 465.

New Jersey. Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57; Groel v. United Elec. Co. of New Jersey, 68 N. J. Eq. 249, 59 Atl. 640;

Puster v. Parker Mercantile Co. (N. J. Eq.), 59 Atl. 232.

New Mexico. Territory v. Baker, 12 N. M. 456, 78 Pac. 624.

New York. Grant v. Cananea Consol. Copper Co., 117 App. Div. 576, 102 N. Y. Supp. 642; Johnston v. Mutual Reserve Fund Life Ins. Co., 104 App. Div. 550, 93 N. Y. Supp. 1052; McQueen v. Middletown Mfg. Co., 16 Johns. 5.

Oregon. Knapp v. Wallace, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054; Aldrich v. Anchor Coal Co., 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Pennsylvania. Phillips v. Library Co., 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; Nash v. Evangelical Lutheran Church, 1 Miles 78.

Texas. Louisville & N. R. Co. v. Missouri, K. & T. R. Co. of Texas, 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276.

Utah. Homerine Mining & Milling Co. v. Tallyday Steel Pipe & Tank Co., 31 Utah 326, 88 Pac. 9.

Washington. Rich v. Chicago, B. & Q. R. Co., 34 Wash. 14, 74 Pac. 1008; Carstens & Earles v. Leidigh & Havens Lumber Co., 18 Wash. 450, 39 L. R. A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051.

In Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289, the court said: "At common law, jurisdiction in an action at law could not be obtained over a foreign corporation except by its voluntary appearance. Under the wide extension of business and commercial intercourse in modern days, corporations formed for such business are accustomed to establish agencies and branches in countries other than that of their creation, and it is now held by English courts that a foreign corporation, by establishing

the Supreme Court are entirely plain that the service of process upon an officer of a foreign corporation which is not engaged in business in the state where the service is made and has no agent there engaged in the transaction of its business, the officer being in the state simply as a traveler, or on his own private affairs, does not confer jurisdiction upon the court, and this without regard to the rank of the officer. On the other hand, it is equally plain that if the corporation is engaged in business in the state where the service is made, or has an officer or agent there, appointed by it for the transaction of its business in the state where the service is made, service upon such officer or agent, if authorized by the statute of the state, confers jurisdiction of the corporation upon the court."⁶⁶ The question whether a foreign corporation is doing business in the state, so that service of process may be made upon its agent, is one of due process of law under the Constitution of the United States.⁶⁷

A statute providing that no foreign corporation shall be subject to the jurisdiction of the courts of the state in personam unless it appear in the action or have an agency established in the state for the transaction of some portion of its business is only declaratory of

an office in England and carrying on business there, is to be considered as a resident of England, and may be sued in its courts. *Newby v. Colts Patent Firearms Co.*, Law Rep. 7 Q. B. 293; *Haggan v. Comptoir d'Escompte de Paris*, Law Rep. 23 Q. B. Div. 519. Under the system prevailing in this country, corporations are regarded as citizens of the state in which they are created; but in other states are regarded as foreign corporations, and their right to transact business therein is subject to such conditions and restrictions as the legislatures of those states may prescribe. For the purpose of enabling their courts to acquire jurisdiction over foreign corporations statutory provisions for the service of process upon them are enacted, and must be strictly followed in order to give validity to their judgments. The residence of a corporation is within the state in which it is created, and, so long as it confines the exercise of its corporate powers

within that state, it is beyond the reach of the process of courts of other states. In order that these courts may acquire jurisdiction to render a personal judgment against such foreign corporation otherwise than by its voluntary appearance, its presence in those states must be manifested by the transaction of its corporate business therein, or by such acts as will indicate the exercise therein of its corporate powers. A fundamental requisite for acquiring such jurisdiction is that the foreign corporation shall be doing business within the state at the time the process of the court is served upon it."

⁶⁶ *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505. See also *Vance v. Pullman Co.*, 160 Fed. 707.

⁶⁷ *Riverside & D. River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. Ed. 910; *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243.

the general rule that in the absence of voluntary appearance, the courts of one state have no jurisdiction over a corporation created in another unless it is transacting some portion of its corporate business within the state where sued, and that as a corporation can act only through its agents, it necessarily follows that if it is doing business in the state, it must have an agency there, within the meaning of the statute, for in no other way can it do business, and hence the statute simply means that, in the absence of a voluntary appearance, no foreign corporation shall be subject to the jurisdiction of the courts of the state unless it is engaged in the transaction of some portion of its corporate business at the time the action is commenced, which is the general rule prevailing in the absence of such a statute.⁶⁸

In preceding sections has been discussed at length what constitutes "doing business" by foreign corporations, within the meaning of statutes regulating them.⁶⁹ Whether a foreign corporation is doing business in the state so as to be subject to process in an action against it is distinct from the question of whether it is doing business in the state so as to bring it within the scope of a statute requiring foreign corporations doing business in the state to comply with certain prescribed conditions.⁷⁰ Activities insufficient to make out a transaction of business, within the meaning of such a statute, may

⁶⁸ *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 643, 49 Pac. 876. See also *Knapp v. Wallace*, 50 Ore. 348, 126 Am. St. Rep. 742; 92 Pac. 1054.

⁶⁹ See §§ 5916-5940, *supra*.

⁷⁰ *Kendall v. Orange-Judd Co.*, 118 Minn. 1, 136 N. W. 291; *International Text Book Co. v. Tone*, 220 N. Y. 313, 115 N. E. 914; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915.

"The nature and the extent of business contemplated by licensing statutes is one thing. The nature and extent of business requisite to satisfy the rules of private international law may be quite another thing. In saying this we concede the binding force of the decision of the Supreme Court in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910, and kindred cases. *Bagdon v. Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, 438, 111 N. E. 1075, L. R. A. 1916 F,

407; *Pomeroy v. Hocking Valley Ry. Co.*, 218 N. Y. 530, 113 N. E. 504. Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here. *St. Louis S. W. Ry. Co. of Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915 B, 77; *Washington-Virginia Ry. Co. v. Real Estate Trust Co. of Phila.*, 238 U. S. 185, 35 Sup. Ct. 818, 59 L. Ed. 1262; *Int. Harvester Co. v. Ky.*, *supra*; *Pomeroy v. Hocking Valley Ry. Co.*, *supra*. If it is here it may be served. *Halsbury, L. C.*, in *Compagnie Générale Transatlantique v. Law*, 1899 A. C. 431." *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915.

yet be sufficient to bring the corporation within the state so as to render it amenable to process.⁷¹ For the purpose of rendering a foreign corporation amenable to the service of process, it is essential that it be doing and transacting in the state business for which it was incorporated.⁷² But under a statute providing that no foreign

⁷¹ *International Text-Book Co. v. Tone*, 220 N. Y. 313, 115 N. E. 914; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915.

"It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for this purpose is a good service." *Beach v. Kerr Turbine Co.*, 243 Fed. 706.

⁷² *Stegall v. American Pigment & Chemical Co.*, 156 Mo. App. 251, 130 S. W. 144.

In *First National Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636, it was said that all agree that the corporation must be doing and transacting business for which it was incorporated, and not merely what it might have authority to do, and that there must be a doing of some of the work or an exercise of some of the functions for which the corporation was created to bring the case within the statute. This case is cited with approval in *Stegall v. American Pigment & Chemical Co.*, 150 Mo. App. 251, 130 S. W. 144.

"Counsel argues that the business for which the defendant was incorporated was the manufacture of pigment. That is true, but outside of this

mechanical work, the doing of which was an object of the incorporation, is the fact that to do this it had to do other acts that were just as much corporate acts as was the manufacture of this pigment. A corporation, an artificial body, cannot successfully manufacture pigment or carry on any other work, whether simple or complicated, except through its officers and agents, whose acts as such are part of the business of the corporation. It is not only the physical but the mental work of these officers and agents that must be relied on for the successful direction of the affairs of a corporation, and the exercise of these acts by these officers and agents is just as much part of the operations of the corporation, part of the doing of business by the corporation as is the mechanical or industrial work in which it is engaged. The evidence shows without question that down to a very short period immediately before this suit was commenced the headquarters of this corporation were located in the city of St. Louis. Here its officers met, its board of directors met, its supervising officers resided, and from here it is fair to assume that the mechanical as well as all other operations carried on at its works in Illinois or elsewhere had their direction. We hold that this is as much doing business and as much within the law as the mechanical part itself, and that without this 'brain work,' so to speak, this direction of the controlling mind there could be no successful conduct of the mechanical work. How near down to the time of the institution of the suit it is neces-

corporation shall transact business in the state until it shall have filed copies of certain papers, and a statement setting forth, among other things, "the character of the business in which it is engaged and in which it proposes to engage in this state," and also designated "a citizen or corporation of this state as its agent, upon whom legal process against such foreign corporation may be served," it is held that even though the business out of which the cause of action against the corporation arose was not within the business specified in the statement filed by it, the corporation could be effectually reached by process served on the designated agent.⁷³ When it is said that a

sary that this work of direction should have been carried on in this state, to bring the corporation within the law, as a corporation doing business in this state, we are not prepared to say. Each case must turn on its own facts. It is very evident, however, that within a very short time prior to the institution of this suit this work of direction was carried on in this state, and that down to the time of the trial it still had important business in this state. That its board of directors had not met here after April 15, 1908, does not necessarily mean that the company did no business here thereafter. The funds of the corporation were kept here in bank down to the latter part of July, 1908; the check-book was here; checks were made out here; contracts were made here; the very work here sued for by this plaintiff was contracted for in this city; and it was done in this city after the contract was made. All this was within the express charter power of the corporation, and could only be done, to be lawful under its charter." *Stegall v. American Pigment & Chemical Co.*, 150 Mo. App. 251, 130 S. W. 144.

⁷³ *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822. *Garrison, V. C.*, said: "To hold that the agency created in accordance with the statute is only servable for causes of action arising out of the business

which the corporation specified that it intended to transact is to limit the act by construction and implication. This would be contrary to its reason and spirit, and should not be done. The defendant company came here and obtained a license and did business. It appointed an agent. So long as it is proper to hold that agency continues, I think it is servable for any cause of action which arose here while the company was here transacting business. The cause of action in question was such. The act (P. L. 1894, p. 347, § 2) provides 'that the business of such corporation to be carried on within this state is such as may be lawfully carried on by corporations incorporated under the laws of New Jersey for similar business.' The corporation act (P. L. 1896, p. 307, § 96) provides, 'Foreign corporations doing business in this state shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations.' That which the defendant did, according to the facts now before the court, was to come into the state of New Jersey; organize and control a corporation; cause such corporation to issue to it bonds and stock; take such bonds and stock, and with them, or some of them, purchase the stocks held in various New Jersey corporations engaged in the business of electric and gas lighting, and also take from such persons cer-

corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of process on foreign corporations, reference is plainly had to business operations carried on within the state through the medium of agents appointed for that purpose that are continuous, or at least of some duration, and not to business transactions that are merely casual, such as an occasional purchase of goods or materials within the foreign state.⁷⁴ A mere casual offer by the president of a foreign corporation, while temporarily sojourning in the state upon his own business, in which state it has no agent or place of business, to receive a proposition relating to the business of his company, is not a transaction of business by an agent in such sense as authorizes the conclusion that the company is transacting business in the state. To be found within the state, a foreign corporation must have sent its agent on whom service is made, to conduct its business therein, either continuously or for a time, so as to complete a transaction or an enterprise, or at least charged with the duty of making a particular contract in the state or negotiating therein for the company.⁷⁵ An isolated or single sale of goods in a

tain sums of money as further consideration; and further give a guaranty that for five years the United Electric Company would pay the interest on its bonds. Taking this all together, it was certainly a 'doing of business' in this state. If it contends that it had no power to do this business, it is met with the doctrine maintained in this state that it may not plead *ultra vires* while it retains the fruits of the alleged illegal acts."

⁷⁴ *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635. See *United States v. American Bell Tel. Co.*, 29 Fed. 7, for elaborate consideration of the question as to what sort of business transactions by a foreign corporation within a state will justify the finding that it is engaged in business therein.

The United States Supreme Court has not undertaken to formulate any general rule defining what transactions are essential to the doing of

business in the sense which will render the one conducting it liable to service of process. It has gone no further than to say that as to corporations: "The business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served." *St. Louis Southwestern Ry. v. Alexander*, 227 U. S. 218, 227, 57 L. Ed. 486, Ann. Cas. 1915 B 77, quoted in *Reynolds v. Missouri, K. & T. Ry. Co.*, 224 Mass. 379, 113 N. E. 413. See, in this connection, *Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 255, 53 L. Ed. 782, 787; *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U. S. 415, 49 L. Ed. 813.

⁷⁵ *Galveston City Ry. Co. v. Hook*, 40 Ill. App. 547, citing *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802; *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170; *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204.

The making of a contract, or enter-

state by a foreign corporation, or even occasional repetitions of such sales is not doing business within the state, so as to render the corporation liable to a personal judgment against it.⁷⁶ "Carrying on of

ing into business relations with a party, within the boundaries of any certain jurisdiction, may render the terms of that contract subject to the laws of that jurisdiction, and in so far as an officer or agent of the corporation was concerned with the making of such a contract he would be engaged in business for the corporation. But the hotel, train, attorney's office, or casual place in which such transaction might be had, could not be construed as a regular place of business, nor as an office for the transaction of business, of the defendant corporation. *Smithson v. Roneo*, 231 Fed. 349.

"Nor would the mere taking advantage of casual presence in any given locality, and the direct interview or arranging for business by word of mouth, instead of by letter or telephone, constitute the doing of business and the maintenance of a place of business, unless the circumstance indicated that the corporation was entering upon the actual conduct of business, in the mercantile sense, in the place where the negotiations were being had, and that the appearance of accidental or casual coincidence and negotiation, through the physical presence of the two parties at the same spot, was but a subterfuge or cloak to cover the real facts." *Smithson v. Roneo*, 231 Fed. 349.

⁷⁶ *Beach v. Kerr Turbine Co.*, 243 Fed. 706.

"The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the Circuit and Su-

preme Courts of the United States, and the general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state." *Doe v. Springfield Boiler & Manufacturing Co.*, 104 Fed. 684, quoted in *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

"Out of the multitude of authorities cited, and which have been examined by the court in the course of its labors, no really satisfactory, comprehensive, and scientifically accurate determination of what is necessary or may be sufficient to constitute 'doing business' in a state has been encountered. In cases like those at bar, in which the corporation obviously is seeking to do all the business it can, and yet all the while escape the jurisdiction of the local tribunals, it probably would not do to accept the general statement indulged in by the Supreme Court in *St. Louis Ry. Co. v. Alexander*, 227 U. S. 218, 227 (57 L. Ed. 486, Ann. Cas. 1915 B, 77), where Mr. Justice Day declared: 'In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation had subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process.' In so far as that may seem to imply a conscious 'subjection' of itself to the 'jurisdiction and laws of the district,' it could hardly ever occur in a case like the ones at bar that the inference could

business by a foreign corporation in another state means something more than a single transaction and certainly more than the one transaction of an attempt to compromise a matter connected with a contract of the state where the foreign corporation resides and has its being." ⁷⁷ To be found within the state, a foreign corporation must

be drawn. Much more compelling language was indulged in by the same court in the *International Harvester Case*, *supra*, where the same justice declared: 'We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state.' In similar vein, Mr. Justice Brandeis in a recent decision (*Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, says: 'A foreign corporation is amenable to process to enforce a personal liability, on the absence of consent, only if it is doing business within the state in such a manner and to such extent as to warrant the inference that it is present there.' So, also, it was said by Judge Hawley, of this circuit, in *Doe v. Springfield Boiler & Mfg. Co.*, 104 Fed. 684, 687, 44 C. C. A. 128, 131: 'The general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state.' Just what may be meant in that statement by the phrase 'some substantial part of its ordinary business' is perhaps indefinite; but I think, upon reason and authority, it may be said that if the corporation is engaged in a more or less continuous effort, not merely casual, sporadic, or isolated, to conduct and carry on within the state

some part of the business in which it is usually and generally engaged, it may be said with due and becoming propriety to be 'doing business' within such state." *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

⁷⁷ *William Grace Co. v. Henry Martin Brick & Mach. Mfg. Co.*, 174 Fed. 131; *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008. See, however, *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505; *Houston v. Filer & Stowell Co.*, 85 Fed. 757; *Fond Du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

See also § 5919, *supra*.

In *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008, the court said: "As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state surrenders itself to Iowa courts because an agent, with or without authority, comes to this state, seeking to adjust such difference. If such be the law, then compromises, so much favored by law, are largely at an end as to foreign corporations. The only case called to my attention, upholding plaintiff's contention, is one decided on the circuit by Judge Grosscup, in the case of *Houston v. Filer* (C. C.), 85 Fed. 757. But that case is not authoritative, and, standing alone, as it does, I cannot follow it. Nor is the other case cited by plaintiff's counsel (*Insurance Co. v. Spratley*, 172 U. S. 602-611, 19 Sup. Ct. 308, 43 L. Ed. 569) in point. Because in that case the company for years had done

have sent its agent on whom service is made to the state to conduct its business therein, either continuously or for a time, so as to complete the transaction or an enterprise, or at least charged with the duty of making a particular contract in the state, or negotiating therein for the company.⁷⁸ The mere making of a contract by a foreign corporation in the state, to be performed in another state, and the fact that the vice president and general manager of the corporation, at the time of the service upon him in an action against the corporation, was temporarily within the state for the purpose of negotiating a sale of the property of the corporation, was not invoking the comity of the state by the corporation for the exercise of its franchise or the transaction of any portion of the business for which it was organized, and did not under the statute, give the court jurisdiction of the defendant, the service on such officer should be quashed.⁷⁹

The mere ownership of lands in a state by a railroad corporation organized under an act of Congress, which has no office and holds no meetings in the state, or the bringing of suits there to protect its lands against trespassers does not have the effect of putting the corporation in the state for the purpose of a personal

business in and under the laws of the state, including the issuance of, and the delivery within the state of, the policy in suit. The company having quit business in the state, an officer went to adjust the claim, and, while there, notice of suit was served on him. Judgment by default being rendered, it was upheld by the Supreme Court. But the state of facts in that case were quite different from those in the case at bar. In that case the company for years had done business in the state, and such business had been done under the statutes of the state. The policy in suit was issued by virtue of the laws of the state. The officer had authority to make a settlement. In the case at bar the defendant had never done business in Iowa. And the officer had no authority to make a settlement, but could only carry the proposition back to Chicago and lay it before his board of directors."

See § 6042, *infra*.

In *William Grace Co. v. Henry Mar-*

tin Brick Mach. Mfg. Co., 174 Fed. 131, the court distinguished *Houston v. Filer & Stowell Co.*, 85 Fed. 757, on the ground that the general manager of the defendant corporation was in the state in reference to the subject-matter involved in the suit.

⁷⁸ *Galveston City Ry. Co. v. Hook*, 40 Ill. App. 547, quoted with approval in *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143. See also *Geo. Wm. Bentley Co. v. Chivers & Sons, Ltd.*, 215 Fed. 959.

⁷⁹ *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 83, 32 Pac. 756.

The negotiations of loans or placing of securities does not of itself constitute doing business in the state. *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96; *Caesar v. Capell*, 8 Fed. 403; *Gilchrist v. Helena, H. & S. R. Co.*, 47 Fed. 593; *Clews v. Woodstock Iron Co.*, 44 Fed. 31; *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864.

judgment against it, based on service of summons upon one of its officers while passing through the state on a railroad train, and such service is insufficient to authorize personal judgment against it.⁸⁰ The keeping of a bank account in another state is not a doing of business in such state so as to make the corporation liable to service there.⁸¹ The sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be "doing business" in every state.⁸² The selling of tickets good over the lines of a foreign railway corporation by agents of other corporations, does not, standing alone, constitute the doing of business by the foreign corporation within the state of sale of the tickets.⁸³

The mere solicitation of business without more commonly has been held not to be the doing of business within a state.⁸⁴ Service of

⁸⁰ *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540, aff'g 12 N. M. 456, 78 Pac. 624.

⁸¹ *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96; *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922.

⁸² *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710.

"The phrase 'doing business,' * * * with relation to foreign corporations doing business in the state, does not include a foreign railroad corporation having the road and traffic without the state, but having an office therein which sells tickets over its lines." *Doty v. Michigan Cent. Ry.*, 8 Abb. Pr. (N. Y.) 427, 428, quoted with approval in *Johanson v. Alaska Treadwell Gold Min. Co.*, 225 Fed. 270.

⁸³ *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841; *Allen v. Yellowstone Park Transp. Co.*, 154 Fed. 504; *Reynolds v. Missouri, K. & T. R. Co.*, 224 Mass. 379, 113 N. E. 413.

See *Allen v. Yellowstone Park Transp. Co.*, 154 Fed. 504, where it was held that the selling by a railroad company of tickets for a defendant foreign transportation company entitling the holder to transportation by defendant's lines of transportation

through the Yellowstone National Park did not render the defendant subject to the jurisdiction of the court.

⁸⁴ *United States*. *Carpenter v. Willard Case Lumber Co.*, 158 Fed. 697. See also *McGuire v. Great Northern Ry. Co.*, 155 Fed. 230.

Illinois. *Booz v. Texas & P. R. Co.*, 250 Ill. 376, 95 N. E. 460.

Massachusetts. *Reynolds v. Missouri, K. & T. R. Co.*, 224 Mass. 379, 113 N. E. 413.

Minnesota. *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, 105 Minn. 198, 117 N. W. 391.

Rhode Island. *Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941, 65 Atl. 261.

Washington. *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650.

In order to render a foreign corporation amenable to the service of process the business done by it in the state must be more than mere solicitation of business, or advertising in the interest of the company's business. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 584-589, 58 L. Ed. 1479, 1481-1483; *Green v. Chi-*

process upon the agent of a foreign railway corporation who was

cago, B. & Q. R. Co., 205 U. S. 530, 533, 51 L. Ed. 916, 917; *Carpenter v. Willard Case Lumber Co.*, 158 Fed. 697; *Goepfert v. Compagnie Générale Transatlantique*, 156 Fed. 196; *Case v. Smith, Lineaweaver & Co.*, 152 Fed. 730; *Buffalo Glass Co. v. Manufacturers' Glass Co.*, 142 Fed. 273; *Boardman v. S. S. McClure Co.*, 123 Fed. 614; *Union Associated Press v. Times-Star Co.*, 84 Fed. 419; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 Fed. 420, 38 L. R. A. 271; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 286; *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434.

In considering whether the facts showed a doing of business within the state by a foreign corporation to the extent which would authorize the service of process upon its agents engaged in the transaction of such business, Mr. Justice Day, in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479, said: "As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state. It is argued that this con-

clusion is in direct conflict with the case of *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595. We have no desire to depart from that decision which, however, was an extreme case. There the railway company, carrying on no business in Pennsylvania, other than that hereinafter mentioned, and having its organization and tracks in another state, was sought to be held liable in the Circuit Court of the United States for the eastern district of Pennsylvania by service upon one Heller, who was described as an agent of the corporation. As incidental and collateral to its business proper the company solicited freight and passenger traffic in other parts of the country than those through which its tracks ran. For that purpose it employed Heller, who had an office in Philadelphia, where he was known as district freight and passenger agent, to procure passengers and freight to be transported over the company's line. He had clerks and traveling passenger and freight agents who reported to him. He sold no tickets and received no payment for transportation of freight but took the money of those desiring to purchase tickets and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order which gave the holder the right to receive from the company in Chicago a ticket over its road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the company's line. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods over the company's line, he exchanged bills of lading over its line, which were not in force until the freight had been

soliciting, within the state, passenger and freight traffic, to be routed over its line, none of which is in the state, is insufficient to bind the corporation, as such act does not constitute "doing business" in the state.⁸⁵ But considered in connection with other circumstances, such as the solicitation of business, correspondence as to complaints, advice as to passenger business, it may constitute a doing of business within the state sufficient to subject it to the service of process.⁸⁶

Having an office, the employment by a foreign railroad company of a "district freight and passenger agent to solicit and procure passengers and freight to be transported over the defendant's line," and having under his direction "several clerks and various travelling passenger

actually received by the company.

Summarizing these facts, Mr. Justice Moody, speaking for the court, said (p. 533): "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute "doing business" in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it.' "

Where a foreign manufacturing corporation having a contract with a resident of the state for the sale of its goods sends its traveling agents into the domestic state for the purpose of advertising the goods, and pushing the sales by giving exhibitions and demonstrations of the merits of such goods, and by assisting the agents of the domestic corporation in getting customers and orders for such goods, such orders to be filled by the domestic corporation out of its stock, such acts or transactions on the part of such agents do not constitute doing business within the state by the foreign corporation, and service of summons upon the secretary of state is not valid on the foreign corporation. *Harrell v. Peters Cartridge Co.*, 36 Okla. 684, 44 L. R. A. (N. S.) 1094, 129 Pac. 872.

⁸⁵ *North Wisconsin Cattle Co. v. Oregon Short Line R. Co.*, 105 Minn. 198, 117 N. W. 391, citing *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916.

⁸⁶ *Reynolds v. Missouri, K. & T. R. Co.*, 224 Mass. 379, 113 N. E. 413. See, however, *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

"The affidavits show that the defendants during the year 1915, and prior thereto, were the owners of several vessels engaged in transporting merchandise on the Great Lakes, and operating a line of vessels carrying cargoes in interstate commerce to and from Buffalo, coming to this port periodically during the season of navigation, where freights were collected by local agents, crews paid off, and vessels fitted out, repaired, or laid up for the winter, as necessary, within the jurisdiction of this court. In these circumstances, even though none of the vessels happened to be in port at the time of serving the summons, I think that the corporations defendant were at that time transacting business within the western district of this state, and that service upon an officer was good and should not be set aside.'" *Frontier S. S. Co. v. Franklin S. S. Co.*, 233 Fed. 127.

and freight agents" has been held not to constitute "doing business within the state."⁸⁷ The employment by a foreign railroad corporation, not owning or operating a line of railway in the state, of an agent to solicit in the state, freight for ultimate shipment over its lines of railway in other states, is not doing business in the state so as to render the corporation amenable to service of process in the state.⁸⁸ A foreign railroad corporation will not be held to be doing business in the state so as to be subject to service of process, merely on account of the fact certain so-called "subsidiary companies" did business in the state.⁸⁹

The mere maintaining an office within the state does not establish a doing of business there so as to subject the corporation to service of process.⁹⁰ The fact that stationery is printed or the corporation's name is placed on the door for a resident agent's convenience is not a determining factor, the real question being whether the office is maintained for the actual doing of the business of the corporation.⁹¹

⁸⁷ Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 61 L. Ed. 710.

A foreign corporation which maintains an office in the state and employs agents at such office to solicit business and to sell railway tickets is doing business in the state so as to be liable to service of process in an action against it. Chesapeake & O. Ry. Co. v. Stojanowski, 191 Fed. 720.

⁸⁸ Berger v. Pennsylvania R. Co., 27 R. I. 583, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941, 65 Atl. 261.

⁸⁹ Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 61 L. Ed. 710; Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 51 L. Ed. 841.

⁹⁰ Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 532, 51 L. Ed. 916, 917; Goepfert v. Compagnie Générale Transatlantique, 156 Fed. 196; McGuire v. Great Northern Ry. Co., 155 Fed. 230; Case v. Smith, Lineaweaver & Co., 152 Fed. 730; Honeyman v. Colorado Fuel & Iron Co., 133 Fed. 96; Union Associated Press v. Times-Star Co., 84 Fed. 419; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co., 54 Fed. 420, 21 L. R. A. 289; Clews v. Woodstock Iron Co., 44 Fed. 31; Max-

well v. Atchison, T. & S. F. R. Co., 34 Fed. 286; People v. Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Galena Mining & Smelting Co. v. Frazier, 20 Pa. Super. Ct. 394.

A corporation has been held not to be doing business, in the sense of maintaining a regular place of business and being liable to service, where the business is really that of another corporation which it controls. Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364, 51 L. Ed. 841; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113; Smithson v. Roneo, 231 Fed. 349.

⁹¹ Board of Trade v. Hammond Elevator Co., 198 U. S. 424, 49 L. Ed. 1111; Doe v. Springfield Boiler & Manufacturing Co., 104 Fed. 684; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co., 54 Fed. 420.

Under a statute providing that summons shall be served by delivering a copy thereof, if the suit be against a foreign corporation doing business in the state, to any agent, cashier or secretary thereof, the employment by a foreign corporation, engaged in mining in another jurisdiction, of a pur-

Where a corporation publishing a newspaper in the state of its creation maintains in addition thereto in another jurisdiction an office at which is employed a permanent office force which furnishes general press reports to other publications, it is doing business in that jurisdiction, so as to be subject to service of process in an action against it.⁹²

A foreign corporation having an office in the state in charge of a sales manager, who had a number of sales agents operating under him, taking orders for plants, which were subject to approval of the corporation at its home office, has been held to be doing business in the state, although it did not own any property in the state, its office furniture and equipment, with the exception of its exhibition plant, being leased.⁹³ Under a statute providing that where a corporation, company or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency may be brought in such county, and that service of process may be made on the agent or clerk employed in such office or agency in all such suits, the office or agency need not be permanent, rather than transient, nor the business carried on be a considerable share of that done by the principal, but it is sufficient if the principal have an office or agency in the county in which the suit growing out of, or connected with, the business of that office or agency is brought, and service of the notice be made upon an agent or clerk employed in that office or agency, and while there must be an office or

chasing agent, whose salary and office rent, and expenses are paid by it, and whose name and that of the corporation appears in the telephone and city directories, but whose authority and power is circumscribed and limited to specific acts for placing orders for the purchase of goods subject to approval and to forwarding goods to the corporation in the jurisdiction where it is engaged in mining is not doing business in the state, so as to be subjected to a judgment in personam by service upon such purchasing agent. *Johanson v. Alaska Treadwell Gold Min. Co.*, 225 Fed. 270.

See also *Smith & Co. v. Dickinson*, 81 Wash. 465, 142 Pac. 1133, where under almost the same facts, it was held that the corporation was not doing business in the state of Washington.

⁹² *Ricketts v. Sun Ptg. & Pub. Ass'n*, 27 App. Cas. (D. C.) 222.

⁹³ *Swift v. Matthews Engineering Co.*, 178 N. Y. App. Div. 201, 165 N. Y. Supp. 136. See also *Prigge v. Selz, Schwab & Co.*, 134 Minn. 245, 158 N. W. 978.

In *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, and also in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 479, therein quoted and cited with approval, it was held that the activities of a foreign corporation, exercised through appointed sales agents, being systematic and regular, were sufficient to subject such corporation to the process of the courts of the state in which such activities were exercised.

agency, and an agent or clerk employed therein, as there is no fixed rule given for ascertaining what constitutes an office or agency, that question must be determined necessarily by the facts in each case.⁹⁴

Under a statute providing that actions may be brought against railway corporations, the owners of mail stages, or other line of coaches or cars in any county through which the line or road thereof passes or is operated and another statute providing that where a corporation has an office or agency in any county for the transaction of business, and suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located, it was held that a foreign corporation which had within the state a train of cars, its personal property, to which were attached the brakes which it manufactured and sold, which train of cars were exhibited and used simply for the purpose of advertisement and exhibition, the cars not being used for the purpose of carrying freight or passengers, was not amenable to the jurisdiction of a court held within the state.⁹⁵

⁹⁴ *Locke v. Chicago Chronicle Co.*, 107 Iowa 390, 78 N. W. 49. See also for construction of such statute, *Wickens v. Goldstone*, 97 Iowa 646, 66 N. W. 896; *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653; *Philp v. Covenant Mut. Benefit Ass'n*, 62 Iowa 633, 17 N. W. 903.

⁹⁵ *Carpenter v. Westinghouse Air-Brake Co.*, 32 Fed. 434. Mr. Justice Brewer, in construing the statute, said: "It refers to cases in which a foreign corporation establishes an agency or office in any county in this state for the purpose of carrying on the business for which the corporation is organized. If the air-brake company, which is a manufacturer and seller of brakes, establish in any county in this state an agency or office for the selling of its brakes, or a place for the manufacture of its brakes, then it would be transplanting a portion of its business to this state, and might be said to be found within the state for the purpose of suit. Take another illustration. Suppose there was a corporation in Illinois engaged in the breeding and selling of Norman horses,

and it should send one of its principal officers to this state to attend the various county fairs with some of its fine animals. In one sense it is carrying on a business, that is it is engaged in advertising, but can it be said it is engaged in the business for which it is incorporated? Can it be said to have established an office or agency in this state for the carrying on of that business? If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere that should send its circulars into the state, send newspapers with its advertisements, would be engaged in its business in that state, and to be found there for purposes of suit. The true rule is that the corporation does not come into the state, is not found in any state, unless in some way it establishes an office or agency for the transaction of the business for which it was organized, and when that is done, it has no right to say it is not found within the state. Unless it goes to that extent it may say: 'I have not entered into or be-

The mere provision for a place of payment in a city in the state of the bonds and the coupons annexed to them issued by a foreign corporation, at their maturity, and their payment at such place is not the doing of business in the state by the foreign corporation so as to render it amenable to service of process therein in an action against it.⁹⁶

The collection of premiums on surety bonds executed by a foreign corporation in a territory prior to its admission to statehood and the continuance of such bonds in force by it after such admission, consti-

come a part of the citizenship or an inhabitant of that state.' It was said in the argument that the very wrong complained of in this case was in the showing and operating of this air-brake upon the defendant's train, and it was argued that if the corporation comes into this state for the purpose of doing a wrong, does it not also come into the state for the punishment of that wrong? And the inquiry was made by counsel, supposing this train of cars had run over a man, and killed him; if that corporation was in the state for the purpose of doing the wrong, was it not also in the state for the purpose of subjecting itself to suit for the wrong done? That does not follow by any means, neither as to a corporation or individual. An individual may be present in this state by an agent to make contracts, yet he is not an inhabitant of or found within the state. I, living in Kansas, may send here an agent to make contracts, but it does not make me an inhabitant of this state; and suppose I remain in Kansas, I am not found in this state. My agent may be here to make contracts, and yet not an agent upon whom process can be served. The same as to a corporation. It may have its agents for some purposes in the state, and yet, unless there be some statute which compels the court to so hold, the mere fact that an agent is here, and does a wrong, does not transfer its citizenship

or inhabitancy or presence so as to be considered as found within the state. In the Case of Telephone Co., 29 Fed. Rep. 17, which was before Judge Jackson, and I believe Judge Sage, in the lower district of Ohio, where the Bell Telephone Company, a corporation of Massachusetts, was sought to be sued in Ohio, the court lays down this: 'In the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the federal courts jurisdiction in personam over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign state or district.' The Westinghouse Air-Brake Company is engaged in the manufacture and sale of brakes. That is its business, which was not carried on in this state. '(2)' That such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporation generally amenable to suit there.' As we have seen, the fair construction of these sections of the Ohio statute does not remove that corporation into this state by the mere fact that it was here with its property for the purpose of advertisement and exhibition."

⁹⁶ Toledo Railways & Light Co. v. Hill, 244 U. S. 49, 61 L. Ed. 982.

tutes "doing business" in the state within the meaning of a statute authorizing service of process upon the secretary of state in actions against foreign corporations.⁹⁷

Where a foreign corporation is doing business in the state, its failure to file a certificate, as ordained by the state laws, that it was transacting business in the state does not prove that it was not so engaged and invalidate service of process upon it within the state.⁹⁸

Whether a foreign corporation had an agency in the county within the meaning of such statute, for the transaction of a part of its business, and whether the action in question grew out of, or was connected with, the business of that agency, are not questions of law, but of fact for the determination of the tribunal trying the facts.⁹⁹ Each case of this kind must depend upon its own facts, and the question is whether the defendant corporation has submitted itself to the local jurisdiction and was present therein so as to warrant service of process upon it.¹

The objection that a foreign corporation was not doing business within the state at the time of the service of process against it may be waived by it.² And where it is not made one of the grounds of a motion to quash the summons and vacate the service thereof, the defendant must be deemed to have waived any objection to service based on that ground.³

⁹⁷ Title Guaranty & Surety Co. v. Slinker, 42 Okla. 811, 143 Pac. 41.

⁹⁸ Frontier S. S. Co. v. Franklin S. Co., 233 Fed. 127.

⁹⁹ Locke v. Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49. See also § 5917, *supra*.

"If the negotiations or business talks had taken place upon a train between San Francisco and New York, claim might be made that the defendant corporation was doing business in every district through which the train passed. Certainly it would have no property resident in that district, and would have no established place of business, nor any office. This indicates that the question of law, as to whether a corporation is conducting business and has a sufficiently defined place of conducting business to justify

the United States courts in holding that it has been found and is liable to service within the district, is primarily a question of fact, and that the legal position rests upon the determination of this question of fact." Chatfield, J., in *Smithson v. Roneo*, 231 Fed. 349.

¹ *Washington-Virginia R. Co. v. Real Estate Trust Co.*, 238 U. S. 185, 59 L. Ed. 1262; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *St. Louis Southwestern R. Co. v. Alexandria*, 227 U. S. 218, 57 L. Ed. 486, 488, Ann. Cas. 1915 B 77.

² *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 106 Pac. 123. See §§ 2977, 3018, 3019, 3125, 6012, *supra*; § 6056, *infra*.

³ *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 106 Pac. 123.

§ 6022. **Necessity that fact of doing business in state appear in record of proceedings.** Where service is made within the state upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment, in the absence of a general appearance, that it appear somewhere in the record, either in the application for the writ or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the state.⁴

Under a statute providing that no corporation shall be subject to the jurisdiction of a court of the state unless it appears in the court or has an agency established therein for the transaction of some portion of its business, or has property therein, and, in the last case, only to the extent of the property at the time such jurisdiction attached, it is held that when service is made within the state upon the agent of a foreign corporation, it is essential, in order to give the court jurisdiction to render a personal judgment, that it appear somewhere in the record that the corporation has an agent in the state conducting some portion of the business for which it was organized.⁵ There is

⁴ *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1, 99 Pac. 1046; *Farrell v. Oregon Gold Min. Co.*, 31 Ore. 463, 49 Pac. 876; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 836, 32 Pac. 756.

See § 6053, *infra*.

In *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, it was held that as there was nothing in the record of a judgment against a foreign corporation to show that the corporation was engaged in business in the state in which the judgment was rendered at the time of the service of process on a person therein as its agent, and the return of the officer gave no information on the subject, it did not appear, even *prima facie*, that the court had jurisdiction to render a personal judgment against the corporation, and that the record, therefore, was not admissible against it in another state. The court said: "The transaction of business by the corporation in the state, gen-

eral or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the corporation in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

The fact should appear somewhere in the record in order to support a judgment rendered against such corporation for failure to appear or answer after a judgment rendered against it for failure to appear or answer after the service of process. *Multnomah Lumber Co. v. Weston Basket Co.*, 54 Ore. 22, 102 Pac. 1.

⁵ *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 83, 32 Pac. 756.

no presumption that a foreign corporation is doing business in the state and it is essential that the jurisdictional facts appear by the record, and it is error to proceed unless the jurisdiction of the court be so shown. The absence of jurisdictional facts cannot be waived, and the failure of the record to disclose such facts should be noticed by the court *sua sponte*.⁶ No presumption will be indulged in favor of a return of service on a foreign corporation failing to show affirmatively the facts required to constitute a valid service, so as to give the court jurisdiction over such corporation.⁷

It is not essential in order to support the jurisdiction of the courts of a state to render a personal judgment by default against a foreign corporation, that it should appear from the return of the service that the corporation was engaged in business in the state at the time the service was made, but it is sufficient that such fact appear elsewhere in the record.⁸

In an action in a federal court against a foreign corporation, a return of the marshal that he served the summons upon the corporation by delivering a true and attested copy thereof to its president, making known to him the contents thereof, is insufficient to confer jurisdiction upon the court over the defendant, as neither the statement, summons, *praecipè* therefor, nor the return recites that the defendant was transacting business in the state.⁹

On an appeal from a judgment by default against a foreign corporation, nothing will be presumed in favor of the judgment, but the record must show affirmatively the existence of every material fact to give the court jurisdiction, and that all the proceedings were in accordance

⁶ Central Grain & Stock Exchange of Hammond v. Board of Trade City of Chicago, 125 Fed. 463.

⁷ Grace v. American Cent. Ins. Co., 109 U. S. 283, 27 L. Ed. 932; United States v. American Bell Tel. Co., 29 Fed. 17.

⁸ Farrell v. Oregon Gold-Min. Co., 31 Ore. 463, 49 Pac. 876, citing St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 822; Knapp v. Wallace, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054. The court, in so holding, said: "And in the nature of things this must be so. The sheriff, as a ministerial officer, is neither required nor authorized to determine the question of jurisdiction and certify to his conclusion

in his return. He is charged with the duty of serving the process, and is required to certify to the fact of such service, and upon whom it was made, and then it remains for the court to determine, from the entire record, whether, under the service as made by him, it has jurisdiction of the person of the defendant. So that we think the objection to the validity of the judgment in question cannot be sustained on the ground that the sheriff did not certify that the defendant was doing business in the state at the time the service was made."

⁹ Jackson v. Delaware River Amusement Co., 131 Fed. 134.

with law, and must show that process had been duly served the required length of time before default was taken.¹⁰

§ 6023. Service on foreign corporation engaged in interstate commerce. It has been contended that as a foreign corporation engaged purely in interstate commerce within a state cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, the ordinary agents of the corporation, although doing interstate commerce business within the state, cannot, by its laws, be made amenable to judicial process within the state, or in other words, so long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the state in which it is carrying on such business. But it is now settled to the contrary by the Supreme Court of the United States, which after characterizing such contention as "a novel proposition," held that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character; in other words, that such fact does not render the corporation immune from the ordinary process of the courts of that state.¹¹

¹⁰ *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57.

¹¹ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 14, 79, aff'g 147 Ky. 655, 145 S. W. 393. Mr. Justice Day, speaking for the court, said: "True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state. In *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 54 L. Ed.

708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. *907, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the state regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the states may pass laws enforcing the rights of citizens which affect interstate commerce, but fall short of regulating such commerce in the sense of which the Constitution gives sole jurisdiction to Congress; citing *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. Ed. 819, 820; *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447; *Kidd v. Pearson*, 128 U. S. 1, 23, 32 L. Ed. 346, 351; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268; and *The Winnebago*, 205 U. S. 354, 362 L. Ed. 836, 840,

§ 6024. Statutes authorizing service where corporation has property within state. By statute in some states it is provided that a foreign corporation which has property within the state may be served with process.¹² Under such a statute it is held that the existence in the state of property belonging to the foreign corporation makes the case an exceptional one, and justice requires in such a case that the plaintiff be permitted to maintain his actions in its courts for the sole purpose of subjecting the property to the payment of his judgment when obtained, as any other rule would permit foreign corporations to defeat the collection of just demands against them accruing in other states by placing their property in the state. In order to give the courts of the state jurisdiction over a foreign corporation in an action against it which accrued in another state, it must have within the state property of some substantial value, and though no specific

in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade. In *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, it is said, it is held that a law of Kansas which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition as a prerequisite of the right to do such business, and which required a certificate from the secretary of state showing that such statements had been filed, as a condition precedent to the right of the corporation to maintain a suit in that state, was void. But that case did not hold, as we should be required to do to sustain the contention of the plaintiff in error in this case, that the fact that the corporation was carrying on interstate commerce business through duly authorized agents made it exempt from suit within the state by service upon such agents. We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest

its presence within the state, although the business transacted may be entirely interstate in its character. In other words, this fact alone does not render the corporation immune from the ordinary process of the courts of the state."

See also *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Reynolds v. Missouri, K. & T. R. Co.*, 224 Mass. 379, 113 N. E. 413; *Atkinson v. United States Operating Co.*, 129 Minn. 232, L. R. A. 1916 E 241, 152 N. W. 410; *Armstrong v. New York Cent. & H. River R. Co.*, 129 Minn. 104, L. R. A. 1916 E 232, Ann. Cas. 1916 E 335, 151 N. W. 917; *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

¹² *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349; *Fontana v. Chronicle-Tel. Co.*, 83 Fed. 824; *Union Associated Press v. Times Printing Co.*, 83 Fed. 822; *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46; *Fontana v. Post Ptg. & Pub. Co.*, 87 N. Y. App. Div. 233, 84 N. Y. Supp. 308; *Jackson v. Schuylkill Silk Mills*, 92 N. Y. Misc. 442, 156 N. Y. Supp. 219; *American Food Products Co. v. American Milling Co.*, 151 Wis. 385, 138 N. W. 1123.

quantity of property or value thereof is necessary to confer such jurisdiction, yet it must be property of a kind or value to justify a reasonable probability that the creditor can secure something from a sale thereof which can be applied as a payment on his demand, and no fiction or artifice will be permitted for the purpose of sustaining the jurisdiction of the court in such a case.¹³ Debts due to a foreign corporation from solvent debtors residing in the state constitute "property within the state" within the meaning of such a statute,¹⁴ but railway cars in transit through the state, or unissued passenger tickets, or a cash book, or similar books, would not constitute property within the state.¹⁵ A leasehold interest in vessels within the state under a lease for the term of forty-nine years constitutes property within the state within the meaning of such a statute.¹⁶

Under a statute providing that the summons or any process in any civil proceeding wherein a foreign corporation is defendant, which has property within the state, or the cause of action arose therein, may be served by delivering a copy of the summons or process to the president, or any other officer or agent of the corporation, it is held that when the defendant establishes the fact that it is a foreign corporation and that the cause of action did not arise within the state, and denies that it has any property within the state, it makes a *prima facie* case against the jurisdiction of the court.¹⁷

A statute providing that service of process upon a foreign corporation can be effected by service upon a resident managing agent only when the corporation has property within the state, applies to

¹³ *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46.

¹⁴ *Fontana v. Chronicle-Tel. Co.*, 83 Fed. 824; *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46.

¹⁵ *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46.

¹⁶ *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349.

¹⁷ *Strom v. Montana Cent. Ry. Co.*, 81 Minn. 346, 84 N. W. 46.

"The plaintiff urges that there is a presumption that the defendant has property within the state of New York. While it may be true that there may be a presumption that a foreign corporation licensed to do business in this state continues to do such business

(see *Burke v. Galveston, H. & H. R. R. Co.*, 173 App. Div. 221, 159 N. Y. Supp. 379), it does not follow that there is a presumption that it has or ever had any property within the state. Whatever may have been defined as 'doing business in the state,' it seems quite clear to me that from the mere fact that a foreign corporation has chosen to secure a certificate permitting it to do business in this state we cannot infer that it had at that time or now has property in this state." *Eastern Products Corporation v. Tennessee Coal, Iron & Railroad Co.*, 102 N. Y. Misc. 557, 170 N. Y. Supp. 100.

service of process in an action brought in a federal court sitting in the state.¹⁸

§ 6025. Place of making service. It is beyond question that in order to authorize personal judgment against a foreign corporation, the process against it must be served within the limits of the state in which the action is brought.¹⁹ Jurisdiction to render a personal judgment against a foreign corporation cannot be acquired by service of the process out of the state in which the action was brought.²⁰

¹⁸ *Union Associated Press v. Times Printing Co.*, 83 Fed. 822.

¹⁹ *United States. Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

Illinois. Steele v. Schaffer, 107 Ill. App. 320.

New Hampshire. Whitcomb v. J. J. Quinlan & Co., 75 N. H. 429, 75 Atl. 525.

Pennsylvania. Wallace v. United Elec. Co., 211 Pa. 473, 60 Atl. 1046.

South Carolina. Tillinghast v. Boston & P. R. Lumber Co., 39 S. C. 484, 22 L. R. A. 49, 18 S. E. 120.

Texas. Louisville & N. R. Co. v. Emerson, 43 Tex. Civ. App. 281, 94 S. W. 1105; *Louisville & N. R. Co. v. Missouri, K. & T. R. Co. of Texas*, 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276; *Bradley v. Burnett* (Tex. Civ. App.), 40 S. W. 170.

Virginia. Dillard v. Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124.

See also § 3007, *supra*.

Without personal service of process had upon a foreign corporation within the state, a judgment in personam cannot legally be rendered against it. *Bradley v. Burnett* (Tex. Civ. App.), 40 S. W. 170.

In a leading case on this subject, Mr. Justice Field said: "But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any

purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation on the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, quoted with approval in *Bickerdike v. Allen*, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740. See also *Webster v. Reid*, 11 How. (U. S.) 437, 13 L. Ed. 761; *Boswell v. Otis*, 9 How. (U. S.) 336, 13 L. Ed. 164; *Cloy v. Trotter*, 118 Ill. 391, 9 N. E. 507; *Fahrig v. Milwaukee & Chicago Breweries*, 113 Ill. App. 525. See further § 6026, *infra*.

²⁰ *Tillinghast v. Boston & P. R. Lumber Co.*, 38 S. C. 319, 22 L. R. A. 49, 18 S. E. 120.

Under a statute providing that in a chancery suit the complainant may cause a copy of the bill together with a notice of the commencement of the suit to be delivered to any defendant residing or being out of the state not less than thirty days previous to the commencement of the term at which such defendant is required to appear, and such service, when proved to the satisfaction of the court, shall be as effectual as if such service had been

Service of process upon a foreign corporation by delivery of a copy to its president in a state other than that in which the suit is pending is insufficient to give the court jurisdiction to render personal judgment against the defendant foreign corporation.²¹ Under a statute providing that where the defendant is a nonresident of the state, the clerk of the court shall upon application of the plaintiff issue a notice to the defendant requiring him to appear and answer the petition, and that the return of service in such cases shall be attached to the original notice and state the time and manner of service, the service of such notice upon a foreign corporation in the state by which it was created is insufficient to confer jurisdiction authorizing a personal judgment against it, notwithstanding an averment in the petition that the defendant did business within the state.²² A statute authorizing any court of the state having equity jurisdiction, in any suit in equity instituted therein concerning property within the jurisdiction of the court, to order and direct that any subpoena or other process to be had in such suit be served on any defendant therein then residing or being out of the jurisdiction of said court wherever he may be found, does not render valid a decree for discovery against a foreign corporation served with process in another state, as such a decree is a personal one, to be enforced against the person decreed to make it.²³

made in the usual form within the limits of the state, and that such service may be proved by the affidavit of the person making the same, delivery to the secretary of a foreign corporation by a sheriff of the foreign state of which such corporation is resident is not legal service of such corporation. *Steele v. Schaffer*, 107 Ill. App. 320.

Under a statute providing that service of process can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in the state personally upon the president, cashier, attorney, or secretary or any resident agent, a personal judgment cannot be rendered against a foreign corporation having no property or agent in the state, in an action

for a breach of contract begun by service of a summons in the state by which the corporation was created. *Tillinghast v. Boston & P. R. Lumber Co.*, 38 S. C. 319, 22 L. R. A. 49, 18 S. E. 120.

²¹ *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124.

²² *Louisville & N. E. Co. v. Missouri, K. & T. R. Co. of Texas*, 40 Tex. Civ. App. 296, 88 S. W. 413, rev'd in 89 S. W. 276, on rehearing on ground of lack of jurisdiction of court of review.

²³ *Wallace v. United Elec. Co.*, 211 Pa. 473, 60 Atl. 1046.

See for able consideration of the attempt to acquire jurisdiction over the person of the defendant by the extraterritorial service of process, *McHenry v. New York, P. & O. R. Co.*, 25 Fed. 65; *Ralston's Appeal*, 93 Pa.

Where a statute provides that the process against a foreign corporation shall be served at or within a certain place, it is essential to the validity of the service that the statutory requirements be complied with.²⁴ Service of process within the state upon the resident agent of a foreign corporation owning property within the state, at a place other than that designated in the declaration filed by it in the office of the secretary of state in pursuance of a statutory requirement, is a valid service, but of course such service must be made at a place within the state.²⁵ Where a statute provides for service of process upon the superintendent of insurance in an action against a foreign insurance company, process may be served upon him at his office in the state though outside of the jurisdiction of the court in which the action is brought, even though there is no provision in the statute authorizing such service.²⁶ Under a statute, providing that certain actions shall be brought in the county where the defendant resides or is summoned, service of process upon the state auditor under a statute providing for such service where a foreign corporation fails to designate an agent for the service of process, confers no jurisdiction against the corporation when the service in such action is made in a county other than that in which the action is brought.²⁷

Where the president and a majority of the stockholders of a foreign corporation doing business in the state resided therein and all the corporate books were in the custody of the president and all the stockholders' meetings were held and one had been called to be held at the place in the state where the president resided, service of process upon the president at his place of residence in the state was sufficient to confer jurisdiction against the corporation.²⁸

§ 6026. Effect of service by publication. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process, or by the general appearance of the defendant in the action, or secondly, by a procedure against the prop-

St. 133; *Coleman's Appeal*, 75 Pa. St. 441; *Steel v. Smith*, 7 Watts & S. (Pa.) 447.

²⁴ *Wagner v. Shank*, 59 Md. 313; *American Surety Co. v. Holly Springs*, 77 Miss. 428, 27 So. 612; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398; *Hammel v. Fidelity Mut. Aid Ass'n*, 42 Wash. 448, 85 Pac. 35.

²⁵ *Littlejohn v. Southern Ry. Co.*, 45 S. C. 96, 22 S. E. 761, distinguishing

Tillinghast v. Boston & P. R. Lumber Co., 39 S. C. 319, 22 L. R. A. 49, 18 S. E. 120.

²⁶ *People v. Justices of City Court of New York*, 25 Abb. N. Cas. (N. Y.) 403, 11 N. Y. Supp. 773.

²⁷ *Masons' Fraternal Acc. Ass'n v. Riley*, 60 Ark. 578, 31 S. W. 148. See also § 3008, *supra*.

²⁸ *National Bank v. Southern Porcelain Mfg. Co.*, 55 Ga. 36.

erty of the defendant within the jurisdiction of the court.²⁹ The courts of a state cannot acquire jurisdiction over persons not present in the state, except for the purpose of adjudicating with reference to property or status there located. This is an inherent limitation upon the power and jurisdiction of the state under our form of government, and cannot be escaped by reason of local statutes declaring such power.³⁰ It is frequently provided by statute that service of process may be made against a foreign corporation by publication of the process in some newspaper of a designated character. In proceedings in rem where the object is to reach and dispose of property within the state or some interest therein, service by publication is sufficient to authorize the court to render judgment in an action for such purpose.³¹ Under a statute providing that service of process

²⁹ See § 2977, *supra*. See also *Boswell v. Otis*, 9 How. (U. S.) 336, 13 L. Ed. 164; *Bickerdike v. Allen*, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 470; *Fahrig v. Milwaukee & C. Breweries (Ltd.)*, 113 Ill. App. 525; *Broome v. Galena, D. D. & M. Packet Co.*, 9 Minn. 239; *Von Hesse v. Mackaye*, 54 Hun (N. Y.) 365, 8 N. Y. Supp. 894.

³⁰ *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

"Substituted service in respect to individuals is allowed where they have property within the jurisdiction of the court, and if personal service cannot be had, service as provided by statute, by publication or otherwise, is allowed to the extent of affecting property which is within the jurisdiction, although the adjudication does not stand as an adjudication generally against the party." *Boardman v. S. S. McClure Co.*, 123 Fed. 614.

³¹ *United States. Missouri Valley Bridge & Iron Co. v. Blake*, 231 Fed. 417; *Welch v. Farmers' Loan & Trust Co.*, 165 Fed. 561; *Ranch v. Werley*, 152 Fed. 509.

Alaska. Nowell v. International Trust Co., 2 Alaska 255.

California. Douglass v. Pacific Mail Steamship Co., 4 Cal. 304.

Georgia. People's Nat. Bank v.

Cleveland, 117 Ga. 908, 44 S. E. 20; *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76; *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300.

Illinois. Fahrig v. Milwaukee & C. Breweries (Ltd.), 113 Ill. App. 525, quoting *Bickerdike v. Allen*, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740; *Price v. American Bible Soc. & Missionary Soc. of M. E. Church of United States*, 29 Ill. App. 476.

Kansas. United States Elec. Lighting Co. v. Martin, 43 Kan. 526, 23 Pac. 586.

Michigan. McLaren v. Byrnes, 80 Mich. 275, 45 N. W. 143.

Minnesota. Broome v. Galena, D. D. & M. Packet Co., 9 Minn. 239.

Nevada. Wildes v. Lou Dillon Goldfield Min. Co., 41 Nev. 364, 170 Pac. 1046; *Victory Milling & Mining Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831.

New York. Coffin v. Chicago Northern Pacific Const. Co., 4 Hun 625, 67 Barb. 337; *Grant v. Greene*, 59 Misc. 1, 111 N. Y. Supp. 1089, rev'd 126 App. Div. 750, 111 N. Y. Supp. 386, 193 N. Y. 306, 86 N. E. 34; *Lanier v. City Bank of Houston*, 9 Civ. Proc. Rep. 161.

Ohio. Foote v. Central American Commercial Co., 26 Ohio Cir. Ct. 378.

Oklahoma. Nicoll v. Midland Sav-

may be made by publication when the person upon whom the service

ings & Loan Co. of Denver, Colorado, 21 Okla. 591, 96 Pac. 744.

Oregon. Knapp v. Wallace, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054.

Virginia. Norfolk & W. R. Co. v. Crull, 112 Va. 151, 70 S. E. 521; Carr v. Bates & Rogers Const. Co., 108 Va. 371, 61 S. E. 754.

Wisconsin. Rollins v. Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

See, generally, §§ 3005, 3006, *supra*.

In New York service of process by publication upon a foreign corporation cannot be made when it has no property and does no business in the state, unless the cause of action arose therein. Rutkosky v. Public Service R. Co., 155 N. Y. App. Div. 631, 140 N. Y. Supp. 821.

It is held in New York that in a proceeding by a court of Canada to wind up the affairs of a West Virginia corporation owning property in Canada, service by publication of process is sufficient to give the Canadian court jurisdiction of the winding up proceeding. Hyde v. Scott, 75 N. Y. Misc. 487, 133 N. Y. Supp. 904.

It is held that where two corporations, one American and the other English, are parties defendant to a bill filed by a stockholder of the English corporation, service by publication upon such English corporation will not confer jurisdiction upon the court to grant personal relief against the directors of the American one, where such English corporation is a necessary party to a proceeding in which such relief is granted; but where such English corporation was organized and exists solely for the purpose of holding the legal title to the stock in such American corporation, a court of equity may upon such service, where the legal situs of the stock in the American corporation is

within the jurisdiction of the court, enter a decree against such American corporation and its officers requiring it and them to issue to the stockholders of such English corporation certificates of stock representing their several rights and interests in such domestic corporation. Fahrig v. Milwaukee & Chicago Breweries (Ltd.), 113 Ill. App. 525.

In a suit against a foreign corporation to remove a cloud upon the shares of stock in a domestic corporation held by such foreign corporation as transferee and to establish the title of the complainant to such shares, it was held that the shares of stock were personal property and, for the purposes of the suit, their situs was the domicile of the domestic corporation, and that the foreign corporation could be legally served with process by publication under a statute providing that in suits brought to remove a cloud from, or to quiet the title to, property in the state to which a non-resident claims title, or an interest therein, such nonresident may be served with process, and where, in such a suit, service was duly perfected upon the nonresident defendant by publication, the proceeding against him was by due process of law. People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20, following Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647. See also §§ 2977, 3005, *supra*.

In Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647, followed in Fahrig v. Milwaukee & Chicago Breweries (Ltd.), 113 Ill. App. 525, the court said: "It is suggested that the requirement in the act of 1875 that a copy of the order of publication 'shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon

is to be made resides out of the state, a foreign corporation may be proceeded against by publication.³² It is held, however, a statute providing for service of notice of suit by publication, is intended to

the person or persons in possession or charge of said property, if any there be,' is inapplicable here, because no one in Michigan is alleged in the bill to have possession of the shares in question. But the bill does not show that the property represented by the certificates of shares is held by a Michigan corporation, which being subject personally to the jurisdiction of the court may be required by a final decree in a suit brought under the act of March 3d, 1875, to cancel such certificates held by persons outside of the state and regard the plaintiffs as the real owners of the property interest represented by them. It is also contended that the words in the act of 1875, 'when a part of said property shall be within another district but within the same state, said suit may be brought in either district in said state,' indicate that the act had reference only to tangible personal property capable of being located in more than one district. This would be too narrow an interpretation of the statute. No reason can be suggested why suits involving the title to shares of the stock of a corporation or company should have been excluded from the operation of the statute. On the contrary, the statute contemplated that there might be cases involving the title to personal property not in the actual manual possession of some person; for the direction is that the order of the court be served upon the person or persons in possession or charge of the property, 'if any there be.' The corporation being brought into court by personal service of process in Michigan, and a copy of the order of the court being served upon the defendants charged with wrongfully holding the certificates of the

stock in question, every interest involved in the issue as to the real ownership of the stock will be represented before the court. We think the circuit court may rightfully proceed under the act of 1875, for the purpose of determining such ownership, and that in dismissing the bill error was committed."

In *King v. Sullivan*, 93 Ga. 76, 20 S. E. 76, it was held that in order to proceed by petition, whether at law or in equity, against specific assets of a foreign corporation, such as bonds or stocks, for the purpose of subjecting them to the satisfaction of a judgment against the corporation, where no service can be had upon it otherwise than by publication, the suit must be one quasi in rem, and the assets must be described so that they can be identified and seized, the jurisdiction to adjudicate or decree in such case depending upon an actual seizure, lawfully made before or pending the action. An allegation made on information and belief is insufficient which, in effect, charges that the foreign corporation had, without consideration, delivered to its codefendants (some of its stockholders resident in this state) bonds and stocks of a named railroad company, without further description of the property sought to be reached and appropriated. The prayer that each of the defendants sued with the corporation be compelled to answer whether, at any time, he received from the corporation any bonds or stocks, and for the appointment of a receiver to sue for and realize their value for the benefit of the complaining creditors, will not aid the jurisdiction.

³² *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 304.

apply only to citizens of foreign states who have been in the state, and departed therefrom, and does not apply to foreign corporations.³³ It is well settled that where the service of process against a foreign corporation is by publication only and there is no general appearance by it, the court cannot render a personal judgment against the corporation.³⁴

Service by publication, being authorized by special statutes in derogation of the common law, such statutes are construed strictly,³⁵ and the statutory provisions for acquiring jurisdiction over a defendant by other than personal service must be strictly pursued.³⁶

The statutes authorizing service of process upon a nonresident defendant generally provide that an order for publication may be granted upon the filing of an affidavit containing the matters required, without making the return of the sheriff either a condition precedent or one of the steps in the application for the order.³⁷ By some

³³ *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300.

See, for construction of statutes providing for service of nonresidents in reference to applicability to foreign corporation, *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20.

³⁴ *King v. Sullivan*, 93 Ga. 621, 20 S. E. 76; *Fahrig v. Milwaukee & Chicago Breweries (Ltd.)*, 113 Ill. App. 525; *Nicoll v. Midland Savings & Loan Co. of Denver, Colorado*, 21 Okla. 591, 96 Pac. 744. See § 2977, *supra*.

³⁵ *Welch v. Farmers' Loan & Trust Co.*, 165 Fed. 561; *Non-Magnetic Watch Co. v. Association Horlogere Suisse of Geneve*, 44 Fed. 6; *Wildes v. Lou Dillon Goldfield Min. Co.*, 41 Nev. 364, 170 Pac. 1046; *Morse v. Presby*, 25 N. H. 299, 302.

See *Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft*, 173 Fed. 624, holding that where the right to sue on a certain class of cases was restricted by statute to resident plaintiffs, an application for an order for service by publication under section 439 of Code Civ. Proc. N. Y. was fatally defective where it did not set forth such residence and could not be amended.

On an application for an order di-

recting service of process by publication, the court cannot determine the question whether it is engaged in business in the district, and therefore service upon one of the directors is service upon the corporation. *Non-Magnetic Watch Co. v. Association Horlogere Suisse of Geneve*, 44 Fed. 6.

³⁶ *Auerbach v. Internationale Wolfram Lampen Aktien Gesellschaft*, 173 Fed. 624; *Wildes v. Lou Dillon Goldfield Min. Co.*, 41 Nev. 364, 170 Pac. 1046; *Victor Milling & Mining Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831. See also § 3006, *supra*.

³⁷ *Eagle Gold-Min. Co. v. Bryarly*, 28 Colo. 262, 65 Pac. 52; *Wildes v. Lou Dillon Goldfield Min. Co.*, 41 Nev. 364, 170 Pac. 1046; *Knapp v. Wallace*, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054; *Norfolk & W. R. Co. v. Crull*, 112 Va. 151, 70 S. E. 521; *Carr v. Bates & Rogers Const. Co.*, 108 Va. 371, 61 S. E. 754.

An affidavit for publication, showing that the defendant is a foreign corporation; that the plaintiff is unable to make service of summons upon the defendant in the state; that the defendant has personal property within the state, which is fully described;

statutes, however, the return of the sheriff is made an essential step in the procuring of the order for publication because of its probative force in establishing that at the time of the publication the summons could not be served upon the defendant in the jurisdiction in which the action is pending.³⁸ Under a statute providing that service by publication shall be allowed only after summons issued and return thereon made that the defendant after diligent search could not be found, and that after such return not less than ten days after issue of summons publication shall be made by order of the clerk of the proper court, it is held that where the publication was not made for more than four months after the return of process in an action against the corporation, such delay was not fatal to the jurisdiction of the court, where the foreign corporation had never engaged in business within the state.³⁹ Where service by publication is relied on solely, and it is alleged in the affidavit therefor, that, with the exercise of due diligence, the plaintiff is unable to procure service of summons on the defendant within the jurisdiction, the facts necessary to show that due diligence was used to obtain personal service should be stated, and where judgment is rendered against a foreign corporation without such requirements being complied with, it is void.⁴⁰ Under a statute providing that in actions which relate to, or the sub-

that his property has been taken possession of by a receiver of the court; that the plaintiff seeks to appropriate this property for the payment of his claim; and that his action is brought upon a contract made between him and the defendant,—is sufficient to authorize service by publication. *United States Elec. Lighting Co. v. Martin*, 43 Kan. 526, 23 Pac. 586.

Under N. Y. Code Civ. Proc. § 439, the order of publication must be founded upon a verified complaint showing a sufficient cause of action against the defendant to be served, and compliance with this requirement is a prerequisite to the order of publication of summons or for service without the state. *Fred S. James & Co. v. Commercial Nat. Fire Ins. Co.*, 170 N. Y. Supp. 402.

See for sufficiency of affidavits for publication, *Broome v. Galena, D. D. & M. Packet Co.*, 9 Minn. 239; *Victor*

Milling & Mining Co. v. Justice Court, 18 Nev. 21, 1 Pac. 831.

See for requisites of affidavit for publication under particular statutes, *Rollins v. Maxwell Bros. Co.*, 127 Wis. 142, 106 N. W. 677.

³⁸ *Eagle Gold-Min. Co. v. Bryarly*, 28 Colo. 602, 65 Pac. 52.

³⁹ *Eagle Gold-Min. Co. v. Bryarly*, 28 Colo. 602, 65 Pac. 52.

⁴⁰ *Nicoll v. Midland Savings & Loan Co.*, 21 Okla. 591, 96 Pac. 744, citing *Romig v. Gillett*, 187 U. S. 111, 47 L. Ed. 97; *Bes Line Const. Co. v. Schmidt*, 16 Okla. 429, 85 Pac. 711.

In *Romig v. Gillett*, 187 U. S. 111, 47 L. Ed. 97, Justice Brewer said: "The Supreme Court of Oklahoma was of opinion that the affidavit for service by publication was wholly insufficient in that it alleged the non-residence of defendants simply upon information and belief, and not positively; that being so insufficient the

ject of which is, real or personal property in the state where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a foreign corporation, service may be had by publication, and also providing that where personal service cannot be had within that jurisdiction, it is held that where an affidavit for the service of process on a foreign corporation by publication does not allege that such corporation had failed to

defendant Myrtle Gillett was not brought into court, and the judgment and all subsequent proceedings were, as to her, absolutely void. On the other hand, it is contended by the appellants that a separate ground for service by publication is 'where the plaintiff, with due diligence, is unable to make service of summons * * * within the territory'; that the affidavit for publication stated positively such inability; that, therefore, it was strictly within the statute, and authorized the publication of notice; that the publication was duly made, the defendants were thereby brought into court, and the judgment and all subsequent proceedings were regular and valid. It may well be doubted whether this contention of appellants can be sustained, at least in cases like this of direct, and not collateral, attack, even if the inability to obtain personal service by the exercise of due diligence is a distinctive ground for service by publication. It would seem that the facts tending to show such diligence should be disclosed, and that an affidavit merely alleging inability was one of a conclusion of law, and not of facts. *McDonald v. Cooper*, 32 Fed. 745; *Carleton v. Carleton*, 85 N. Y. 313; *McCracken v. Flanagan*, 127 N. Y. 493, 28 N. E. 385; *Ricketson v. Richardson*, 26 Cal. 149; *Bray v. Seaman*, 30 Cal. 610; *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698; *Little v. Chambers*, 27 Iowa 522; *Hampson v. Shiawassee County Circuit Judge*, 54 Mich. 236, 19 N. W.

967; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576. Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind, by § 3924, a summons can be issued to and served in any county of the territory. But while the affidavit for publication may have been insufficient, we are unable to concur with the Supreme Court of Oklahoma in its conclusions. A publication of notice was in fact made, and a publication based upon an affidavit which, however defective it may have been, was intended to be in compliance with the statute. It was approved by the court, which upon it rendered a decree of foreclosure, which was executed by the proper officers in the proper way. By virtue of the proceedings the mortgagee was put into possession,—a possession which he transferred to the appellant Harding. Under those circumstances, what right has the appellee, a grantee from the mortgagor? The foreclosure was a proceeding in equity, although its various steps were prescribed by statute. Equitable principles must control the measure of relief. Even if the publication had been founded upon an affidavit perfect in form, and the decree and all proceedings had been in strict conformity to the statute, yet by § 8955, the defendant would be let in to defend upon compliance with certain conditions."

comply with the requirements to do business in the state, including the designation of an agent upon whom service might be had, a judgment rendered thereon without further notice upon or any appearance by such corporation is void.⁴¹ It is a general rule that an affidavit for publication of summons, which merely repeats the language of the statute or its substance is not sufficient, but the ultimate facts of the statute must be proved by the affidavit, by showing the probative facts upon which the ultimate facts depend, and that it is not sufficient for the order to state that the ultimate facts "appear to the satisfaction of the court," but they must be sustained by the probative facts stated in the affidavit; in other words the probative facts set out in the affidavit must be sufficient to justify the court in being satisfied of the existence of the ultimate facts required by the statute before it has jurisdiction to order service of summons by publication.⁴² Under a statute providing that when the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons, the affidavit for the order of publication must state either the residence of the defendant corporation or that such residence is unknown to the affiant.⁴³ Under a statute of a state providing that before service by publication can be made, an affidavit must be filed that service of summons cannot be made within the state upon the defendant sought to be served, it is held that an affidavit stating that service could not be made upon an individual defendant and the defendant foreign corporation is insufficient.⁴⁴

Under a statute authorizing service of process upon certain officers and agents of a corporation, and providing that if none of them can

⁴¹ *Nicoll v. Midland Savings & Loan Co. of Denver, Colorado*, 21 Okla. 591, 96 Pac. 744.

⁴² *Wildes v. Lou Dillon Goldfield Min. Co.*, 41 Nev. 364, 170 Pac. 1046; *Victor Milling & Mining Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831.

See *Victor Milling & Mining Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831,

for sufficiency of affidavit for publication of summons.

⁴³ *Wildes v. Lou Dillon Goldfield Min. Co.*, 41 Nev. 364, 170 Pac. 1046. See also *Victor Milling & Mining Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831.

⁴⁴ *Welch v. Farmers' Loan & Trust Co.*, 165 Fed. 561.

be found in the county, the corporation may be notified by publication and mail, it was held that in an action in assumpsit against a foreign corporation, it was improper to sustain a motion to quash service because obtained by publication, as for the purposes of the motion, it was immaterial whether only a judgment in rem could be rendered on such service, and if intended for any other purpose the statute was unconstitutional and void.⁴⁵

§ 6027. Service by mailing process or notice of suit. Under a statute providing that if suit be against a corporation created by a certain other state, in addition to such personal service made on certain prescribed officers of the corporation, a copy of the summons attached to a certified copy of the complaint, shall be deposited in the post office, addressed to the president and trustees of the corporation at their place of business in such other state, if the same is known, or can, after due diligence be ascertained, the mailing of the summons with the other instruments attached thereto as provided by the statute adds no force to the return as made by the officer in the summons, if there has been no personal service made on any agent, cashier, or secretary, president or other head thereof.⁴⁶ Under a statute authorizing service of process upon a foreign corporation by service of the summons within the state upon any officers or agents of the corporation, or upon the conductor of any railroad train or upon the master of any vessel belonging to and in the service of the corporation, against which the cause of action had accrued, and providing that the plaintiff shall, within a specified time after the commencement of the suit, send notice by mail to the corporation defendant at its home office, the failure on the part of the complainant is not jurisdictional, and the omission to send the notice to the home office is an irregularity only, when the general officers of the company have been fully apprised of the commencement of the suit by a personal service of the process upon one of their number in the state where the action was brought, and it is error to dismiss the suit on motion of the defendant.⁴⁷

⁴⁵ Price v. American Bible Soc. & Missionary Soc. of M. E. Church of United States, 29 Ill. App. 476.

⁴⁶ Lonkey v. Keyes Silver Min. Co., 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57. See also Columbia Star Milling Co. v. Brand, 115 Miss. 625, 76 So. 557.

As to the method of serving process

on corporations, see §§ 3009, 3010, supra.

⁴⁷ Emerson, etc., v. McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182. Sherwood, J., said: "This requirement if valid, is not jurisdictional. It is ultra-territorial, in a proceeding in personam and which several au-

§ 6028. Scope of statutes providing for service. Whether a statute providing for service of process upon corporations generally includes within the term "corporations" foreign corporations, depends upon the intent of the legislature by which such statute was enacted.⁴⁸ It is generally held that a statute providing for the service of summons upon corporations applies as well to foreign corporations, except where there are special provisions to the contrary.⁴⁹ Thus it is held that a statute providing that when suit is against a corporation, the summons may be executed by delivering a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent, or any other agent thereof, includes foreign as well as domestic corporations, and that other statutes making special provisions for service on foreign corporations doing business in the state, when they are sued, are cumulative, for the greater convenience of those who desire to institute legal proceedings against such corporations, and to hold otherwise would be by judicial

thorities hold migratory. * * * But if mailing the notice were necessary, the only object to be accomplished is information to the principal officers having control of the company's affairs of the existence of the suit. This was fully accomplished when service was made upon the secretary, whose principal business was at the home office, and who says in his affidavit 'had notice by mail been sent, he would have been the person at the home office to receive it.' He had already been served with a certified copy of the writ. It is difficult to see what necessity or useful purpose would have been accomplished had the notice been mailed. Under the circumstances of this case, and as they appear on this record, we must hold the omission to send the notice to the home office an irregularity only."

⁴⁸ See *Boyle v. Oro Plata Mining & Milling Co.*, 14 Ariz. 484, 131 Pac. 155; *Reath v. Western U. Tel. Co.*, 89 Mich. 22, 50 N. W. 817. See also § 2985, *supra*.

⁴⁹ *United States. Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. Ed. 963; *Société Foncière*

et Agricole des États Unis v. Milliken, 135 U. S. 304, 34 L. Ed. 208; *Lively v. Picton*, 218 Fed. 401.

Alabama. Eagle Life Ass'n v. Redden, 121 Ala. 346, 25 So. 779; *Western U. Tel. Co. v. Pleasants*, 46 Ala. 641.

Georgia. City Fire Ins. Co. v. Carugi, 41 Ga. 660.

Illinois. Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *C. N. Woodard v. Angldile Computing Scale Co.*, 172 Ill. App. 211.

Iowa. Gross v. Nichols, 72 Iowa 239, 33 N. W. 653.

Nebraska. Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

New York. Wilde v. New York & H. R. Co., 1 Hilt. 302.

Oregon. Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 213, rehearing denied 101 Pac. 1099; *Riddle v. Order of Pendo*, 49 Ore. 229, 89 Pac. 640; *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 50 Pac. 186, 49 Pac. 876; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

construction to render nugatory the statute first mentioned.⁵⁰ In some jurisdictions, however, statutes providing for service upon corporations have been construed not to be applicable to foreign corporations, but to apply only to domestic corporations.⁵¹ Some

Pennsylvania. Frick & Lindsay Co. v. Maryland, Pennsylvania, etc., Co., 44 Pa. Super. Ct. 518.

Tennessee. Stonega Coke & Coal Co. v. Southern Steel Co., 123 Tenn. 428, 31 L. R. A. (N. S.) 278, 131 S. W. 988; Cumberland Telephone & Telegraph Co. v. Turner, 88 Tenn. 265, 12 S. W. 544.

As to service upon corporations generally, see §§ 2985-3020, *supra*.

Foreign corporations are served in the same way as domestic ones. City Fire Ins. Co. v. Carrugi, 41 Ga. 660.

By coming into the state to do business a foreign corporation submits to the same mode of service as is provided for domestic corporations, if there is no special mode provided for foreign ones. Farrell v. Oregon Gold Min. Co., 31 Ore. 463, 50 Pac. 186, 49 Pac. 876; Aldrich v. Anchor Coal Co., 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Prior to the Act of 1903 (Laws 1903, p. 111), providing for a registered agent, a foreign corporation was served through the same persons and in like manner as a domestic one. Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 213, rehearing denied 101 Pac. 1099.

⁵⁰ Eagle Life Ass'n v. Redden, 121 Ala. 346, 25 So. 779. See § 6031, *infra*.

It is held in Nebraska that a statute providing that "a summons against a corporation may be served upon the president * * * chairman of the board of directors or trustees, or other chief officer, or, if its chief officer is not found in the county, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof," applies to all corporations hav-

ing an office or usual place of business in the state, whether a foreign corporation or one organized under the laws of the state, notwithstanding the existence of another statute providing that where a foreign corporation has a managing agent in the state, the service may be on such agent. The court said: "It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office in this state for the transaction of business, seeking thereby to promote its own interest, such office will also be its place of business where a summons may be served upon it; and a party aggrieved will not be required to go into another jurisdiction to enforce his rights against it. It must take the burden with the benefit." Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

⁵¹ **Arizona.** Boyle v. Oro Plata Mining & Milling Co., 14 Ariz. 484, 131 Pac. 155.

Michigan. Grand Trunk Ry. Co. of Canada v. Wayne Circuit Judge, 106 Mich. 248, 64 N. W. 17; Reath v. Western U. Tel. Co., 89 Mich. 22, 50 N. W. 817; People v. Wayne Circuit Judge, 24 Mich. 38.

Minnesota. Sullivan v. La Grosse & M. Steam Packet Co., 10 Minn. 386.

North Carolina. Williams v. Iron Belt Building & Loan Ass'n, 131 N. C. 267, 42 S. E. 607.

Vermont. Hall v. Vermont & M. R. Co., 28 Vt. 401.

Under a statute providing that it shall not be lawful for any insurance

of the statutes provide a distinctive process on domestic as distinguished from foreign corporations, and where this is so the process suitable for a domestic corporation will not suffice for a foreign one and vice versa.⁵² If the process for a specified class of foreign corporations is prescribed, other foreign corporations not of that class cannot be so brought into court.⁵³

Statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended, namely, that of bringing such bodies into court. They are permitted to enter the state by comity only, and in the methods of subjecting them to the jurisdiction of the courts they cannot insist upon a technical or strict construction in their favor.⁵⁴

§ 6029. Statutory requirements as to service to be followed. As at common law there is no method by which a corporation of one

company incorporated in any other state to do business in Indiana until such company shall file with the auditor of state a certified copy of a resolution of the board of directors of such company consenting that service of process in any suit against such company may be served upon any authorized agent of such company in Indiana with like effect as if such company was incorporated in Indiana, and agreeing that such service may be so made with such effect while any liability remains outstanding against such company in this state, and agreeing further that, if at any time there shall be no authorized agent of such company in the county where any suit shall be brought, service may thereafter be made upon the auditor of state with such effect as if made upon an authorized agent of such company, it is held that such special legislation excepts foreign insurance companies from the effect of other statutes upon the subject of foreign corporations doing business within the state. *Rehm v. German Ins. & Sav. Institution*, 125 Ind. 135, 25 N. E. 173.

⁵² *Boyle v. Oro Plata Mining & Milling Co.*, 14 Ariz. 484, 131 Pac.

155; *Reath v. Western U. Tel. Co.*, 89 Mich. 22, 50 N. W. 817.

⁵³ *Robb v. Chicago & A. R. Co.*, 47 Mo. 540.

Mich. Comp. Laws, § 10442, as amended by Pub. Acts 1909, No. 3, as to actions against foreign corporations, is limited in its application to foreign corporations transacting interstate commerce, and service on other foreign corporations which have complied with the statutory requirements as to doing business in the state is governed by the statute regulating service on domestic corporations. *Yund v. Excelsior Wrapper Co.*, 185 Mich. 143, 151 N. W. 653.

⁵⁴ *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560; *Minneapolis Threshing Mach. Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113.

At common law a corporation must be sued in an action on a contract in the jurisdiction of its domicile. All statutes authorizing such suits elsewhere are in derogation of the common law and should not be extended beyond their manifest meaning. *Byers v. Union Cent. Life Ins. Co.*, 17 Ind. App. 101, 46 N. E. 475.

state may be compelled to respond personally in the courts of a foreign state, yet as such foreign corporation may by legislative act be required to come personally before the courts of any state, outside of that of its incorporation, into which it has entered for the purpose of transacting its corporate business through officers or agents there located, on such terms and conditions as the legislature may prescribe, so long as such method constitutes due process of law, it follows, of necessity, that the precise method adopted by the lawmaking power must be followed, or no valid personal service is made and no jurisdiction is obtained. And, as the court possesses no inherent jurisdiction over them, such corporations have the right to rely on the law as enacted being followed before any one as defendant is bound or concluded by a personal judgment rendered against it.⁵⁵ In accordance with this rule, where a statute prescribes the manner in which jurisdiction over a foreign corporation defendant may be acquired, such method must be followed in order that a court may obtain jurisdiction.⁵⁶ And where the legislature has the power to say that

55 United States. Swarts v. Christie Grain & Stock Co., 166 Fed. 338; Carpenter v. Willard Case Lumber Co., 158 Fed. 697; New River Mineral Co. v. Seeley, 120 Fed. 193; Sobrio v. Manhattan Life Ins. Co., 72 Fed. 566; Farmer v. National Life Ass'n of Hartford, Connecticut, 50 Fed. 829.

Arkansas. Union Guaranty & Trust Co. v. Craddock, 59 Ark. 593, 28 S. W. 424; Southern Building & Loan Ass'n v. Hallum, 59 Ark. 583, 28 S. W. 420.

Colorado. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Maryland. Oland v. Agricultural Ins. Co. of Watertown, 69 Md. 248, 14 Atl. 669; Wagner v. Shank, 59 Md. 313.

Mississippi. American Surety Co. v. Holly Springs, 77 Miss. 428, 27 So. 612.

Nevada. Lonkey v. Keyes Silver Min. Co., 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57.

New Jersey. Pennsylvania R. Co. v. Kreitzman, 57 N. J. L. 60, 29 Atl. 587.

New York. Coolidge v. American

Realty Co., 92 App. Div. 14, 86 N. Y. Supp. 318.

Pennsylvania. Lehigh Valley Ins. Co. v. Fuller, 81 Pa. St. 398.

Washington. Hammel v. Fidelity Mut. Aid Ass'n, 42 Wash. 448, 85 Pac. 35.

West Virginia. Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

Wisconsin. Farmers' Loan & Trust Co. v. Warring, 20 Wis. 290.

See § 2989, *supra*.

⁵⁶ Coolidge v. American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318.

In Lonkey v. Keyes Silver Min. Co., 21 Nev. 312, 321, 17 L. R. A. 35, 31 Pac. 57, 60, where it was held that service of process on a foreign corporation, made by delivering a copy to the deputy secretary of state, was bad because the statute at that time authorized service on the secretary of state only, it was said: "Until a defendant in an action is served with process in one of the modes pointed out by the statute, and given a reasonable opportunity of being heard in

service of process on one or more of the many different officers and agents of a foreign corporation shall bind the corporation to respond personally to such action, but has named only one of such officers or agents, the corporation is not bound by service made on any other officer or agent no matter how high his representative standing or how great his authority in the corporation may be, for the reason that there are no provisions of law authorizing it.⁵⁷ Thus where it is provided by statute that where the defendant is a foreign corporation, having a managing agent in the state, the service may be made upon such agent, it was held that the court had no jurisdiction to render personal judgment against a defendant foreign corporation where the return of service of process against it showed service upon a "general agent" of such corporation.⁵⁸ So also, under a statute providing for service upon a managing or business agent of a foreign corporation doing business in the state, a return of service upon A. B. "agent for" the foreign corporation is not sufficient to confer upon the court jurisdiction to render a personal judgment against the corporation.⁵⁹ Under a statute authorizing service of process upon a specified state official under certain circumstances, service of process on the deputy of such official is unauthorized, and confers no juris-

defense of his rights, a court has no power to divest him of his property." Quoted with approval in *King Tona-pah Min. Co. v. Lynch*, 232 Fed. 485.

See, however, *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

⁵⁷ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Carpenter v. Willard Case Lumber Co.*, 158 Fed. 697. See § 2989, *supra*.

In *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57, the court said: "In the case of *City of Watertown v. Robinson*, 69 Wis. 233, 34 N. W. Rep. 139, the Supreme Court of that state said: 'When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est*. There is no chance to speculate whether some other mode will not answer as well. This has been too often held by courts to require further citations. When the statute designates a particular officer to whom the process may be delivered,

and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others.' This language was afterwards approved and adopted by the Supreme Court of the United States in the case of *Army v. Watertown*, 130 U. S. 317, 9 Sup. Ct. Rep. 537."

Under a statute requiring service of process upon an agent designated by the foreign insurance company for that purpose, it was held that personal service of the process upon a local agent, together with the mailing of a copy to the agent designated, was not sufficient service. *Oland v. Agricultural Ins. Co. of Watertown*, 69 Md. 248, 14 Atl. 669.

⁵⁸ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338. See § 6035, *infra*.

⁵⁹ *Sobrio v. Manhattan Life Ins. Co.*, 72 Fed. 566.

diction upon the court.⁶⁰ And under a statute providing that no foreign insurance company shall transact business in the state until it has complied with the insurance laws thereof, and appointed the superintendent of the insurance department its attorney upon whom process in any action against the corporation may be served with the same effect as if the company existed in the state, it was held that the superintendent of the insurance department who had been so appointed by a foreign insurance company had no authority to accept service of process sent to him by mail, and that such would be set aside.⁶¹

§ 6030. Upon whom process may be served generally. In a preceding chapter have been discussed the requisites and sufficiency of service upon corporations, including the person upon whom service may be had.⁶² At common law, process against a corporation must be served upon its head or principal officer.⁶³ Where, however, a

⁶⁰ *Simon v. Southern R. Co.*, 195 Fed. 56; *Old Wayne Mut. Life Ass'n v. Flynn* (Ind. App.), 66 N. E. 57; *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597; *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57. See § 6036, *infra*.

⁶¹ *Farmer v. National Life Ass'n of Hartford, Connecticut*, 50 Fed. 829.

In *Old Wayne Mut. Life Ins. Co. v. Flynn* (Ind. App.), 66 N. E. 57, the court considered *South Pub. Co. v. Fire Ass'n*, 67 Hun (N. Y.) 41, 21 N. Y. Supp. 675, where it was held that service on a clerk in the office of the superintendent of insurance was sufficient, saying: "Appellee's position is that process under the statute was intended to be served on the person who was empowered by law to perform the duties of insurance commissioner; that the duty was imposed upon the office and not the individual. *South Pub. Co. v. Fire Association of Philadelphia*, 67 Hun 41, 21 N. Y. Supp. 675, is cited. The law of New York authorized the service of process on the superintendent of insurance. The service was made on the clerk in

the office. The court held this to be sufficient. The opinion sustains appellee's position. With it, however, we cannot agree. No authorities are cited in its support. Where the question has arisen in other jurisdictions it has been decided the other way. It is true, as stated by the appellee, that jurisdiction of a court of general jurisdiction is presumed, but presumption yields when the contrary affirmatively appears."

⁶² See §§ 2985-3016, *supra*.

⁶³ *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 70 L. R. A. 513, 2 Ann. Cas. 207, 49 S. E. 674; *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

By the common law, process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty by whose law it exists, and any authority for proceeding against it in any other manner must be conferred by statute of the state where process is served. *Aldrich v. Anchor Coal & Development Co.*, 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756, citing *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L.

corporation created by one state goes into another state for the purpose of transacting the business of the corporation through its officers, agents, employees, and servants there located, it may be required to appear personally before the courts of such state on any terms to which it has assented as a condition precedent to the right to engage in its corporate business within the state, or it may be required to respond personally to such method of service as the legislature of such state may provide, as long as the method prescribed by the legislature constitutes due process of law.⁶⁴ Natural justice requires the officers and agents of a foreign corporation who transact its business in another state, to be subject to the process of that state, as the representatives of the corporation.⁶⁵

As a general rule, in the very justice of the case and upon principles of public policy, where a foreign corporation is sought to be bound by notice to or service of process upon an officer or agent, such officer or agent should sustain such a relation to the matter growing out of the character of his employment as would, *fide et fiducia*, impose upon him the duty to report the fact of such service to the corporation.⁶⁶ This is the rule in respect to the law of agency in the matter

222; *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5.

⁶⁴*Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338; *Carpenter v. Willard Case Lumber Co.*, 158 Fed. 697. See also *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1.

"When a foreign corporation comes into this state, the legislature, by virtue of its control over the law of remedies, may define the agents of the corporation on whom process may be served. *Lafayette Ins. Co. v. French*, supra. If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit." *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915. In distinguishing *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, and *Simon v. Southern Ry.*

Co., 236 U. S. 115, 59 L. Ed. 492, the court, after saying they were not to the contrary, said: "They were fully considered in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, L. R. A. 1916 F 407, Ann. Cas. 1918 A 389, 111 N. E. 1075. In those cases, the corporations had no agent within the state. The attempt was made to hold them by service on a public officer, whom the statute required them to designate as their agent, but whom they had refused or failed to designate. In the case before us, we have to deal with a very different situation. The corporation is here; it is here in the person of an agent of its own selection; and service upon him is service upon his principal."

⁶⁵*Berlin Iron Bridge Co. v. Norton*, 51 N. J. L. 442, 17 Atl. 1079.

⁶⁶*Strain v. Chicago Portrait Co.*, 126 Fed. 831; *Central of Georgia R. Co. v. Eichberg*, 107 Md. 363, 14 L. R. A. (N. S.) 389, 68 Atl. 690; *Duryee v. Sunlight Gas Mach. Co.*, 74 N. Y.

of an effective notice to an agent to bind the principal.⁶⁷ Consequently, on principle, it would seem that one may be deemed to be the agent of a foreign corporation only where he sustains such relation to it and to the matter involved that it is his duty as such agent to report the fact of service to the corporation by which he is employed.⁶⁸

The object of all service of process for the commencement of a suit or any other legal proceeding is to give notice to the party proceeded against, and any service is sufficient which virtually accomplishes that and answers the requirements of natural justice and fundamental law. What service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only to the limitation that the service must be such as may be reasonably expected to give the notice aimed at.⁶⁹ If the person served sustains sufficient character and rank to render it reasonably certain that the corporation would be apprised of the service, the requirement of the statute is answered.⁷⁰ A

Misc. 440, 132 N. Y. Supp. 407.

⁶⁷Strain v. Chicago Portrait Co., 126 Fed. 831, citing Story on Agency, § 140, and Hayward v. National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400.

⁶⁸United States. Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569; King Tonopah Min. Co. v. Lynch, 232 Fed. 485; Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352, 43 L. R. A. (N. S.) 1015; Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co., 136 Fed. 505; Strain v. Chicago Portrait Co., 126 Fed. 831.

Arkansas. Lesser Cotton Co. v. Yates, 69 Ark. 396, 63 S. W. 997.

Maryland. Central of Georgia R. Co. v. Eichberg, 107 Md. 363, 14 L. R. A. (N. S.) 389, 68 Atl. 690.

New York. Palmer v. Pennsylvania Co., 35 Hun 369, aff'd 99 N. Y. 679; Duryee v. Sunlight Gas Mach. Co., 74 Misc. 440, 132 N. Y. Supp. 407.

North Carolina. Whitehurst v. Kerr, 153 N. C. 76, 68 S. E. 913.

When the character of an agency of a foreign corporation is such as to render it fair, reasonable and just to imply an authority on the part of the

agent to receive service, the law will and ought to draw such an inference and imply such authority, and service under such circumstances and upon an agent of that character is sufficient. Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569, followed in Lesser Cotton Co. v. Yates, 69 Ark. 396, 63 S. W. 997.

⁶⁹Pope v. Terre Haute Car Mfg. Co., 87 N. Y. 137, quoted with approval in Connecticut Mut. Life Ins. Co. v. Spratley, 99 Tenn. 332, 44 L. R. A. 442, 42 S. W. 145, aff'd 172 U. S. 603, 43 L. Ed. 569, and Thach v. Continental Travelers' Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255.

⁷⁰Newport News & M. Val. Co. v. McDonald Brick Co.'s Assignee, 109 Ky. 408, 59 S. W. 332; Whitehurst v. Kerr, 153 N. C. 76, 68 S. E. 913.

"The method of service on corporations prescribed by statute must be one that with reasonable certainty will result in actual notice to the corporation." King Tonopah Min. Co. v. Lynch, 232 Fed. 485, quoting with approval Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959.

Where a statute required every for-

statute providing for service of process upon any person in the employ of a foreign corporation or who has any of its property in charge, when it has no acknowledged agent in the state upon whom process may be made, is valid.⁷¹ The acquirement of jurisdiction

foreign corporation doing business in that state to designate an agent upon whom service of process could be made, and provided, in the event of noncompliance, that service of process could be made on the secretary of state, and pursuant thereto, service was had upon such officer, who merely filed the process, and made no effort to notify the company, and the company, though doing business in the state, had no actual knowledge of the pendency of the action until after final judgment, it was held, in view of the failure of the statute to provide for actual notice to the corporation, either within or without the state, by mail or otherwise, that the judgment of the state court was rendered without due process of law, and was therefore void. *Southern Ry. Co. v. Simon*, 184 Fed. 959. The court said: "It is fundamental that the method of citation should be fairly calculated to bring home to the defendant actual notice of the pendency of the action and allow him a reasonable time to put in his defense." In the course of this opinion the following comment on the same statute was quoted from *Gouner v. Mississippi Valley Bridge & Iron Co.*, 123 La. 964, 49 So. 657: "There is a feature in the law last cited that is peculiar, and adds something to its illegality when it is proposed to maintain a service, as in this case. As applying exclusively to foreign corporations absent from the state, within the extreme meaning of the word 'absentee' we will state: This law makes no provision whatever for the service on the defendant. The officer may decline to communicate with the person sued, and give no no-

tice whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile." See *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

⁷¹ *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532. The court said: "This statute is based upon the presumption that a person intrusted by a foreign corporation with the possession of its property will, in the discharge of his duty, communicate to it the service upon him of any process against such corporation issued in any suit that may result in a judgment and execution that may deprive him of his possession and such corporation of its property. The probabilities are, under such circumstances, that the corporation will be informed of the pendency of the suit. The principle involved is similar to that when the law authorizes service made by a copy left at the defendant's usual place of abode with some person of sufficient age and capacity, or in cases of constructive notice. The legislators doubtless thought the authority to make such service might be necessary to meet the contingencies which might arise in the administration of public justice. Conceding human motives their usual play, such service is likely to result in actual notice to persons whose rights may be affected by such methods and modes of procedure. Such laws are based upon the assumption that men will be prompt to protect their own interest, and diligent

over the person of a foreign corporation by service of summons and notice of the object of the suit, by delivering copies thereof to "any agent having charge of or conducting any business therefor in this state," constitutes due process of law.⁷² The agent upon whom service may be made must be an agent in fact, not merely by construction of law. He must be one having in fact representative capacity and derivative authority.⁷³

The question whether a person without express authority to receive service of process sufficiently represents the corporation so that service upon him will be binding upon the corporation, depends upon the facts surrounding his relationship to the corporation and upon the inferences which the court might properly draw from them.⁷⁴ It is often difficult to determine whether service upon a particular employee of a foreign corporation will be sufficient to bring the corporation into court under statutes providing for service upon an agent of such a corporation.⁷⁵ The line between those who represent and those who do not represent a foreign corporation for the purposes of a statute providing for the service of process upon an agent of a foreign corporation in an action against it cannot be defined by a formula.⁷⁶ In declaring that it is not necessary that the agent upon whom service was made should be expressly invested with authority to receive service of process in behalf of the foreign corporation, but that authority might be implied, Mr. Justice Peckham said: "If it appears that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority and service under such circumstances, and service upon an agent of that character would be sufficient."⁷⁷

in the discharge of their duties to those who have reposed confidence in them. We are of the opinion that the law authorizing the service as it was made in this case is valid."

⁷² *Minneapolis Threshing Mach. Co. v. Ashauer*, 142 Wis. 646, 126 N. W. 113.

⁷³ *Fawkes v. American Motor Car Sales Co.*, 176 Fed. 1010; *Wold v. J. B. Colt Co.*, 102 Minn. 386, 114 N. W. 243; *Mikolas v. Hiram Walker & Sons*, 73 Minn. 305, 76 N. W. 36.

⁷⁴ *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Boulton v. International Paper Co.*, 229 Fed. 951; *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, Ann. Cas. 1914 D 981, 76 S. E. 117.

⁷⁵ See *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760; *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991.

⁷⁶ *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760.

⁷⁷ *Connecticut Mut. Life Ins. Co. v.*

Under a statute providing that in all personal actions against a

Spratley, 172 U. S. 602, 43 L. Ed. 569, followed in *Abbeville Elec. Light & Power Co. v. Western Electrical Supply Co.*, 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559. See, however, *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991.

In *State v. Connecticut Mut. Life Ins. Co.*, 106 Tenn. 282, 61 S. W. 75, the Supreme Court of Tennessee, in differentiating the case of *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, said of such case: "(1) That the company had done business and had the transaction out of which the suit arose in Tennessee; (2) that Chaffee, as agent, had come into Tennessee in a representative capacity; (3) that he had come with respect to the original Tennessee transaction; (4) that undeniably an agent of the company was in Tennessee, and in a representative capacity, and consequently the sole question was whether, under such circumstances, process could be served on the agent so as to bind the company. It was held under the peculiar statute, that it could."

See also *Thatch v. Continental Travelers' Mut. Acc. Ass'n*, 114 Tenn. 271, 87 S. W. 255.

In *Strain v. Chicago Portrait Co.*, 126 Fed. 831, the court said: "Now, what was his relation to the company? He seems to get a certain commission on the work obtained for the company, and he is given a certain district in which to operate in the state of Missouri—the northwestern part, including the county of Jackson. He employs such assistants and employees as he sees fit in assisting him in this matter of drumming up and getting business for the company and sending these orders in; that is the substance of it. The question presented is whether that is such an agent, within

the purview of the statute, as would authorize service upon the nonresident corporation to entitle the plaintiff to a judgment in personam upon such service. It is a question not wholly free from embarrassment. But, after giving it such investigation as opportunity permits, I have reached the conclusion that, as applied to the particular facts of this case, this party ought not to be held to be such agent as that service could be had upon him. The question has undergone two close and scrutinizing investigations by the Supreme Court of the United States, and I shall not refer to the many cases ruled upon the circuit, because I have not the time nor is it necessary here to do so. The case of *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, and the case of *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, are the most interesting because they present the reasons for the rule, and lay down some underlying fundamental principles which ought to guide the court in determining such cases, without being influenced or controlled so much by the particular and specially ruled cases. Mr. Justice Field in *St. Clair v. Cox*, 106 U. S. 355, 27 L. Ed. 222, would seem to indicate that his judgment was influenced largely by the question as to whether or not the subject-matter of the litigation in the case in which the service was had upon the imputed agent in any wise pertained to his functions as the agent or employee of the company. He said: 'All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all

foreign corporation, process may be served upon any officer, director,

that is visible of its existence, and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

* * * If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. * * *

We do not, however, understand the law as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the state, and the agent be appointed to act there. We so construe the words "agent of such corporation within this state." They do not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there.' Further on, in discussing the case of *Newell v. Railway Company*, 19 Mich. 344, the court said: 'Admit-

ting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, the then official and officer then in a manner impersonating the company, should be served. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose.' In this case it was ruled that where the officer's return simply stated that he had served the agent of the nonresident corporation, and the return did not disclose the fact that the defendant company was doing business in the state, and the record in the case did not disclose that the suit in question grew out of his transactions, the judgment was void, and subject to attack collaterally. Under that ruling, if the defendant in this case should stand upon this return, and the petition did not even disclose the fact that the corporation was doing business in this state, or that the service was made upon an authorized agent, it would be bad. The petition in this case shows that the cause of action is an alleged malicious prosecution instituted by the defendant corporation against the plaintiff. What had Mr. Gurley, upon whom the process in this case was served, to do with the matter

agent, clerk or engineer of such corporation, it is held that when a foreign corporation enters the state for the transaction of business, the person to whom it commits the management and control of its business in such state becomes the agent of the corporation for the purpose of receiving service of process in all actions arising in such state out of the conduct of the business.⁷⁸ Where a foreign corpora-

or transaction in question, which in no wise pertained to his special contractual relation to the defendant company? He was under no obligation to report to the company any transaction or suit which did not touch his business domain. He had naught to do with the subject-matter of this suit. It did not grow out of his employment. In the very justice of the case, and upon principles of public policy, where the principal is sought to be bound by notice to or process upon an agent or employee, such agent or employee should sustain such relation to the matter growing out of the character of his employment as would, *fide et fiducia*, impose upon him the duty to report the fact to his principal or employer. This is the rule in respect to the law of agency in the matter of an effective notice to an agent to bind the principal. Story on Agency, § 140; Hayward, etc., v. Nat. Insurance Company, 52 Mo. 191, 192, 14 Am. Rep. 400. This inheres in the rule that the assumed agent is acting in a representative capacity for the company at the time of the notice or service of process. As the nonresident corporation must be doing business in the state to authorize service on the agent or employee, it would seem reasonable that such service of process ought to be in an action in some way connected with or touching the matter which the employee represents. This would seem to be the idea not only expressed by Mr. Justice Field in *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, but also by Mr.

Justice Peckham in *Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 43 L. Ed. 569."

⁷⁸ *Berlin Iron Bridge Co. v. Norton*, 51 N. J. L. 442, 17 Atl. 1079, distinguishing *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312. See *Geo. Wm. Bentley Co. v. Chivers & Sons, Ltd.*, 215 Fed. 959; *Central of Georgia Ry. Co. v. Eichberg*, 107 Md. 363, 14 L. R. A. (N. S.) 389, 68 Atl. 690.

"Where a foreign corporation sends its agent or representative into this state to solicit the sale of pulpwood to it, to be delivered in this state, and he procures contracts therefor signed by the seller of such pulpwood, and then forwards them to such corporation for its signature, it is 'doing business in this state,' and the service of a summons upon such agent within this state is a valid service upon the corporation." *Duluth Log Co. v. Pulpwood Co.*, 137 Minn. 312, 163 N. W. 520.

A foreman in charge of the work of erecting an oil tank contracted to be erected in the state by a vendor foreign corporation may be served with process in an action against it. *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

In a suit against a corporation created by an act of Congress, not residing or doing business in the state, and having no office or place of business therein, service of process upon an agent appointed by the land commissioner of the corporation and its trustees, whose business is merely to receive and transmit offers for lands and to assist in making sales, will not

tion transacts business in the state through an agent, and the character of the agency is such that the agent may be properly held in law to be an agent possessed of sufficient authority to receive service of process in behalf of the corporation, it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him.⁷⁹ The name which a person representing a foreign corporation assumes, even with the knowledge of his principal, will not be controlling, when the real character of his employment appears.⁸⁰ It was also held that where a person residing in the state claimed to be a correspondent, and not an agent, of a foreign corporation engaged in dealing in stocks, grain and provisions, took orders for stocks, grain and provisions, and transmitted such orders by telegraph over a wire leased by the corporation and installed in his office and sublet by it to him, and all commissions and margins collected by him were deposited to its credit in a bank in the state, a check for his proportion of such commissions being sent to him by the foreign corporation, which paid all the losses incurred upon the transactions and appropriated all the profits arising therefrom, except the commission paid to him, he was the agent of the corporation in the conduct of its business in the state, within the meaning of such statute, and service of process upon him in an action against the corporation was binding upon it.⁸¹ The fact that the relations between a foreign corporation and those through whom it transacts business in the state are attempted to be fixed by contract between them to the effect that parties shall deal as principals, and that the relations of principal and agent shall neither exist nor be held to exist is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned.⁸² Thus where a foreign corporation furnished to certain persons called

give the court jurisdiction, such person not being an agent of the corporation, in the sense of a statute authorizing service of process on an agent. *Union Pac. R. Co. v. Miller*, 87 Ill. 45.

⁷⁹ *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, distinguishing *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Cumberland Co. v. Lewis*, 32 Ky. L.

Rep. 1300, 108 S. W. 347.

⁸⁰ *Fawkes v. American Motor Car Sales Co.*, 176 Fed. 1010; *Boardman v. S. S. McClure Co.*, 123 Fed. 614.

See also *Ricketts v. Sun Ptg. & Pub. Ass'n*, 27 App. Cas. (D. C.) 222.

⁸¹ *Boyd Commission Co. v. Coates*, 24 Ky. L. Rep. 730, 69 S. W. 1090.

⁸² *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

"correspondents" continuous market quotations to enable them to procure orders from customers resorting to the correspondents' offices and desiring to trade in certain grain or stock, which orders when given are transmitted to the defendant for execution, and the method of business shows that the party really interested in the transaction is the corporation and that the correspondents are compensated by a commission charged to the customer for their services, it was held that such correspondents may be treated as agents of the foreign corporation for the service of process notwithstanding that the relations of the correspondent and the foreign corporation are in each case fixed by formal contract to the effect that the parties shall deal as principals and the relations of principal and agent are expressly disclaimed.⁸³

When an individual, officer or agent of a foreign corporation, is, within the authority committed to him, performing an act of the corporation within the state, the latter is deemed present physically in the person exercising its powers.⁸⁴ Hence, although a statute may in terms authorize a suit against a foreign corporation whenever the plaintiff resides in the state and the summons can be served upon some officer or agent of the corporation, those statutes are ineffective to give jurisdiction unless the presence of such officer or agent within

⁸³ *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111. Mr. Justice Brown said: "The fact, however, that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is not decisive of their relations so far as third parties dealing with them upon the basis of their being agents are concerned. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602. As was said in this case, of the agents whose authority to receive service of process was denied by the defendants: 'In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assent that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to

him, and if he be that kind of an agent, the implication will be made, notwithstanding a denial of authority on the part of the other officers of the corporation. * * * In the absence of any express authority the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them.' See also *Italian-Swiss Agri. Colony v. Pease*, 194 Ill. 98; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128."

⁸⁴ *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640. See also *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, Ann. Cas. 1914 D 981, 76 S. E. 117.

the borders of the state amounts to the presence of the corporation, for it is undoubtedly possible for an individual who is incidentally an officer of a corporation to come into the state in his personal capacity without bringing the corporation with him.⁸⁵

Some of the statutes providing for the service of process upon foreign corporations authorize service upon "any agent."⁸⁶ What persons come within the meaning of the term "agent" has been the subject of much discussion.⁸⁷ Where a statute provides that a foreign corporation may be brought into court by delivering a copy of the summons to the cashier, the delivery of a copy to a person who has no interest in the corporation beyond the fact that he receives the price of papers sold by him in one of the departments of the corporation fails to satisfy the requirements of the law.⁸⁸ Where a person has authority to contract for a foreign corporation he is its agent for the purpose of accepting service of process within the meaning of a provision authorizing service of process upon specified officers or any agent.⁸⁹ The word "agent" in a statute authorizing service

⁸⁵ *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640, citing *Goldney v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, and *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113. See also § 6041, *infra*.

⁸⁶ *Kentucky*. *Barnes v. Maxwell Motor Sales Corp.*, 172 Ky. 409, 189 S. W. 444; *Nelson Morris & Co. v. Rehkopf & Sons*, 25 Ky. L. Rep. 352, 75 S. W. 203; *Boyd Commission Co. v. Coates*, 24 Ky. L. Rep. 730, 69 S. W. 1090. See *Kirby v. Louismann-Capen Co.*, 221 Fed. 267, considering sufficiency of service of process upon agent under Ky. Civ. Code Proc., § 51.

Maryland. *Central of Georgia Ry. Co. v. Eichberg*, 107 Md. 363, 14 L. R. A. (N. S.) 389, 68 Atl. 690.

See also *Duryee v. Sunlight Gas Mach. Co.*, 74 N. Y. Misc. 440, 132 N. Y. Supp. 407, construing Code Pub. Gen. Laws Md. 1904, art. 23, § 411.

New Jersey. *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079.

South Carolina. *Sellers v. Home Fertilizer Chemical Works*, 76 S. C.

343, 56 S. E. 978; *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991.

Texas. *Missouri, K. & T. Ry. Co. v. Demere & Coggin*, — Tex. Civ. App. —, 145 S. W. 623.

⁸⁷ *Saxony Mills v. Wagner*, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899; *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, Ann. Cas. 1914 D 981, 76 S. E. 117; *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991.

⁸⁸ *Eisenhofer v. New Yorker Zeitung Pub. & Prtg. Co.*, 91 N. Y. App. Div. 94, 86 N. Y. Supp. 438.

⁸⁹ *McSwain v. Adams Grain & Provision Co.*, 93 S. C. 103, Ann. Cas. 1914 D 981, 76 S. E. 117.

In a case before the Supreme Court of South Carolina, one-half of the court contended that "Claim of agency based on any other authority short of power to contract * * * should be allowed with great caution," and held that under a statute providing that service of process can be made in respect to a foreign corporation only when it has property

of process upon an agent of a foreign corporation does not mean

within the state, or the cause of action arose therein, or where such service shall be made in the state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof, service upon a keeper of a foreign corporation engaged in certain construction work in the state, who was merely an employee, subject to discharge at a day's notice, and without authority to contract or bind the corporation in any matter whatever, was insufficient to bind the corporation. By the other half of the court, it was urged that such service was sufficient, it being said: "The test of agency is not the power to make a contract binding upon the employer. Such power shows agency, but agency may also be shown by the fact that a person represents the master in some one or more of his relations to others, even though he may not have power to contract. The statute makes service on 'any agent' of a foreign corporation sufficient. The statute, therefore, does not require that the agent shall be general, but is complied with by a service upon an agent having limited authority to represent the principal." *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991. In the opinion of judges upholding the contention that service upon the timekeeper was not sufficient to confer jurisdiction upon the court, it was said: "The only evidence on the subject was to the effect that Rowley was a laborer and timekeeper, paid by the day and subject to discharge at a day's notice, without authority to contract or bind the company in any manner whatever, and the question of law is whether a person who sustains this relation to his employer can be regarded as an agent. An agent is generally defined as a person who acts on behalf of another person who is his principal. While in practical affairs

the relation assumes so many phases, it is often quite difficult to apply the definition, it is certainly necessary to constitute agency that there should be some kind of representation of the principal by virtue of authority conferred by him. Authority to contract is sufficient to constitute agency under this statute. * * * The claim of agency based on any other authority short of power to contract it is said by high authority has rarely been maintained, and certainly it should be allowed with great caution. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590. 'Employee' is manifestly a much broader term than 'agent' and it is therefore not sufficient under this statute to show that the service was made on an employee without showing that such employee was also an agent. Of all classes of employees a day laborer has the most transient and readily severed connection with the person whom he serves, and no warrant will be found either in legal precedent or the common understanding of practical men for regarding him an agent or representative. * * * *Connecticut Mutual Life Ins. Co. v. Spratley*, *Rose's Notes*, 3 Supplement, 993; *Abbeville E. L. & P. Co. v. Western E. S. Co.* (S. C.), 85 Am. St. Rep. note 933. The work of a laborer employed as a timekeeper is purely mechanical, implying no more discretion than that of a laborer who works with his spade. In a certain sense the master is responsible for the result of every laborer's work, and as to those with whom he contracts as well as the outside world he is bound by it, but this does not make the laborer an agent of the master upon whom process can be served to bind the master as principal. The circuit judge rests his conclusion mainly upon the authority of the case of

every man who is intrusted with a commission or employment, but designates the principal officers of the corporation who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special.⁹⁰

Abbeville E. L. & P. Co. v. Western E. S. Co., 61 S. C. 361, 382, 55 L. R. A. 146, 85 Am. St. Rep. 890; but the facts of the case are entirely different, and neither the reasoning of the court nor the principle announced furnish any ground for holding that Rowley could be regarded the agent of the defendant in this case. After discussing the leading case of Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, referring to that case, the court says: 'As we have seen above, and as is held in the last case cited, the character of the agency depends upon the inquiry whether the agent can be regarded as the representative of the corporation in respect to the transaction out of which the suit arises. The practical inquiry, therefore, is whether George F. Schminke was the representative of the defendant corporation in this state, in regard to the transaction out of which the controversy arose. This must be determined by an examination of the undisputed testimony in the case, proceeding largely, and in fact entirely, from the defendant corporation itself.' The court then holds that the letters of the defendant proved conclusively that the person served was sent to Abbeville as the representative of the defendant in the very matter in dispute and out of which the action arose. Here Rowley, the person served, had no connection with defendant's business except as a mere day laborer employed as a timekeeper. He, therefore, did not represent the defendant, and was not an agent upon whom the summons could be legally served in an action against the defendant, a foreign corporation."

Where a foreign corporation was engaged in an advertising and selling campaign in Minnesota, and its agent in the state, who had charge of its business, had an office and place of business in the state, and employed agents and solicitors who advertised and sold and delivered the corporation's products to customers in the state, and a stock of its goods was kept on hand at the place of business of the agent, and most of the goods sold and delivered in this state by such solicitors and agents were procured from the stock in charge of such agent, it was held that the corporation was doing business in this state, and that the court acquired jurisdiction by service of process upon such agent. *Jenkin v. Royal Baking Powder Co.*, 131 Minn. 335, 155 N. W. 103.

⁹⁰ *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469, followed in *Saxony Mills v. Wagner*, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199.

In holding that in an action against a foreign corporation publishing a newspaper in the state of its domicile, service of summons in the state upon a person whose only connection with the company consisted in receiving advertisements at the published rates, forwarding the same to the home office, receiving thence bills for the same and collecting them upon commission, was not a service upon an agent of the company within the meaning of a statute providing for service of process on an agent of such corporation, the Supreme Court of New Jersey said: "The line between those who represent and those who do

But where a statute, besides providing for the appointment of an agent to accept service and for service on a state official, contains the further provision that service may also be made "on any officer or agent," the word "agent" is not to be construed as limited to a person having some authority, discretion or control over some part of the corporation's business.⁹¹ Under a statute providing that in personal suits or actions against any foreign corporation process may be served on any officer, director, agent, clerk or engineer of such corporation, either personally or by leaving a copy thereof at his dwell-

not represent a foreign corporation for the purposes of this act cannot be defined by a formula. But it was never intended that every servant who happened to do some act in this state for a foreign corporation represented the company. Service upon a carter who was sent across the ferry into this state for a load of merchandise belonging to a foreign corporation would be absurd. These persons have little, if any, more representative character than the carter. The act of one of them, at least, in sending a copy served to the World office did not create an agency." *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760, distinguishing *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079.

A foreign corporation has been deemed bound by service of process upon a representative whom it has permitted to maintain an office in the state with the words "Western agent" following his name on the door of the office, and to whom in correspondence it has referred parties as its agent for the settlement of business matters. *Italian-Swiss Agr. Colony v. Pease*, 194 Ill. 98, 62 N. E. 317, aff'g 96 Ill. App. 45.

See also *State v. Pennsylvania Steel Co. of Philadelphia*, 123 Md. 212, 91 Atl. 136.

Under N. Y. Code Civ. Proc. § 432, where an action is brought against a foreign corporation which has no property in the state upon a contract

not made in or to be performed within the state, service of process upon a person not an officer or managing agent of the corporation will be set aside. *Wimpie v. Foster Mach. Co.*, 176 N. Y. App. Div. 903, 162 N. Y. Supp. 962.

⁹¹ *Arnold v. Huber Mfg. Co.*, 166 Mich. 190, 131 N. W. 537, construing Mich. Acts Spec. Sess. 1907, No. 3, and holding service upon an expert machinist employed by a manufacturing company sufficient.

Under a statute providing that an action against a corporation may be brought in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, and that if the suit be against a foreign corporation doing business in the state, the summons may be served on any agent of the corporation, but not specifying any particular kind of agent, it was held that a foreign corporation which regularly landed at a wharf in the state and there regularly discharged and received passengers and freight was doing business in the state and where service of process was made in an action against it upon the wharfinger and purser who were in charge of such business, the court had jurisdiction to render judgment against the corporation. *Sievers v. Dallas, P. & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539.

ing-house or usual place of abode, or by leaving a copy at the office, depot or usual place of business, it was held that service on the engineer in charge of the defendant foreign corporation's boat for transferring cars from a point in the state to a point across the river in another state was insufficient to confer jurisdiction upon the court.⁹² Service of process upon a local freight agent of a foreign corporation, who was only a subordinate employee of the corporation, having no express authority to receive the process, and no general charge over its corporate concerns, and no such connection with the business out of which the cause of action arose as might fairly support an inference that he had authority to represent the corporation for the purpose of service, is not binding upon the corporation.⁹³ Where the word "agent" is used in contradistinction to the words "chief officer," "vice president," "secretary," "cashier," "treasurer," or

⁹² *Carroll v. New York, N. H. & H. R. Co.*, 65 N. J. L. 124, 46 Atl. 708. The court said the decisions of that state "indicate that, to legalize service of process upon a foreign corporation, the circumstances must show that the person on whom service is made has such connection either with the corporation, or with the business out of which the alleged cause of action arose, that he should be considered the representative of the corporation for the purpose of service. If he has no connection with the business, and no general representative character in the corporation, there is no basis for a claim that the corporation has, through him, been brought into court by due process of law. * * * In its designation of the classes of persons on whom process against foreign corporations may be served, our statute must be construed in the light of the constitutional principle that only by due process of law can courts acquire jurisdiction over parties; and therefore when it refers to agents, clerks, and engineers,—persons whose relation to the corporation may give them no representative character whatever in regard to the litigation contemplated,—the courts must con-

sider those general terms in such a way as will uphold the jurisdiction which they are asked to exercise. In the present case the engineer of the Maryland was only a subordinate employee of the defendant, having no general charge over its corporate concerns; nor nor had he such connection with the business out of which the cause of action arose as might fairly support an inference that he had authority to represent the corporation in the matter now before us."

It was held, however, by a federal court sitting in the same state that under such a statute service on a locomotive engineer was sufficient. *Devere v. Delaware, L. & W. R. Co.*, 60 Fed. 886.

Under a statute providing that service of process may be made upon any agent having charge of or conducting any business of the corporation within the state, service of process upon a captain of one of the vessels of a foreign transit corporation operating vessels is sufficient to bind the corporation. *Phillips v. Portage Transit Co.*, 137 Wis. 189, 118 N. W. 539.

⁹³ *Erie R. Co. v. Van Allen*, 76 N. J. L. 119, 69 Atl. 484.

“managing agent,” it should be construed broadly and liberally.⁹⁴ But under a statute permitting service on the managing agent, service is not good where made upon one empowered merely to solicit advertising and who is empowered to enter into a contract for the corporation with regard to advertising only.⁹⁵ A mere soliciting agent employed by a foreign corporation is not an agent within the meaning of such a statute.⁹⁶ But where the agent of a foreign corporation, employed to advertise its newspaper, and procure subscribers thereof, visited a town in the state, solicited subscriptions therein, and distributed copies of the newspaper, and was active in circulating them throughout the town, sold some of them, though he was forbidden by his principal to do so, and made some collections for it, it was held that service of process upon him in an action against the foreign corporation for a libel contained in an edition of such newspaper, copies of which were distributed by him and advertised by hand bills circulated by him in such town, was sufficient to confer upon the court jurisdiction of the defendant corporation.⁹⁷ Under a statute providing that in a suit against a foreign corporation the summons must be served by delivering a copy thereof to an officer or person designated by the corporation as one upon whom process may be served, and if no such person can be found then upon certain specified agents “or other agent having management, direction or control of any property of such corporation,” service of process upon a person temporarily in the state on his own private business but who had been requested by the vice president of a foreign corporation to collect a claim due such corporation from a resident of the state was not sufficient to confer jurisdiction upon the court over the corporation, as such person did not come within the meaning of the term “other agent” as used in such phrase.⁹⁸ Under a statute providing that in actions

⁹⁴ Minneapolis Threshing Mach. Co. v. Ashauer, 142 Wis. 646, 126 N. W. 113. See Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 Pac. 258.

⁹⁵ Union Associated Press v. Times-Star Co., 84 Fed. 419; Fontana v. Post Ptg. & Pub. Co., 87 App. Div. (N. Y.) 233, 84 N. Y. Supp. 308; Vitolo v. Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273. See, however, Brewer v. George Knapp & Co., 82 Fed. 694.

⁹⁶ Saxony Mills v. Wagner, 94 Miss. 233, 23 L. R. A. (N. S.) 834, 136 Am.

St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899.

⁹⁷ Locke v. Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49.

⁹⁸ Honerine Mining & Milling Co. v. Tollerday Steel Pipe & Tank Co., 31 Utah 326, 88 Pac. 9. The court said: “It will be observed that the other persons named in the statute, upon whom service may be made, fall within a class, all of whom confessedly represent the corporation in the business for which it was created, and which it is conducting. Can it rea-

against a foreign corporation, engaged in business in the state, sum-

reasonably be contended that the 'other agent' mentioned in the statute is intended to apply to persons other than the class first enumerated? If the object of the statute were other than for the purpose of conferring personal jurisdiction of the corporation, such a contention might not only be plausible, but might have great force. But, when the purpose of the statute is kept in mind, it seems clear to us that the phrase 'other agent' must be given a restricted meaning, so as to bring it within the evident purpose and spirit of the statute. The phrase 'other agent,' therefore, we think, must be held to mean a person who is in some way connected with the business of the corporation for which it was created, or has under his control any property in some way related with such business. * * * The thought that we have in mind and desire to enforce is fairly well illustrated in the case of *Mikolas v. Hiram Walker & Sons, limited*, 73 Minn. 305, 76 N. W. 36, where the Supreme Court of Minnesota, speaking upon this subject, say: 'The statute does not define the word "agent"; but, as the service of process goes to the jurisdiction of the court over the person, it must be construed as to conform to the principles of natural justice, and so that the service will constitute "due process of law." To do this, the agent must be one having in fact a representative capacity and derivative authority. Such agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication contrary to the intention of the parties.' Moreover the phrase 'other agent' must be restricted in its application to the same class as are the other persons mentioned in the statute. This is illustrated in the

case of *Atlas Glass Co. v. Ball Bros. Glass Co.* (C. C.), 87 Fed. 418, where *Coxe, J.*, in passing upon the question now under consideration, says: 'In construing the statute the doctrine of *noscitur a sociis* is applicable; the term "managing agent" is found associated with "president," "secretary," "clerk," "cashier," "treasurer," and "director," and it is to be presumed that the lawmakers intended to describe an agent possessing powers analogous to those of the executive officers of the corporation. He must be an agent employed by the corporation, representing it in some capacity, and acting for it to a limited extent at least.' For further illustrations of the foregoing maxim, see *Lewis' Sutherland, Statutory Construction*, §§ 414-419. As to when certain words and phrases must receive a restricted application see same volume and author, § 376. We do not wish to be understood as holding that by the term 'other agent' it is intended that such 'other agent' must possess executive powers, but what we do mean is that he must at least belong to that class of agents who have been appointed by the corporation to represent it in its business affairs, or who are by it recognized as its agents, and intrusted with some of its property, which in some way has connection with its general business affairs. In other words, the 'other agent' must possess some of the powers possessed by the persons named immediately preceding the phrase 'or other agent.' This counsel seem to concede by their claim that the service in this case is made upon the 'other agent' named in the original statute. The case of *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532, is not an authority in this case. The statute, under which the service was upheld in

mons may be served on the manager, or agent of, or person in charge of such business in the state, in the county where the business is carried on, or in the county where the cause of action occurred, it was held that where a foreign corporation telegraphed to a broker in the state its prices on hides, and he with these quotations of prices, sold

that case, provides that service upon a foreign corporation could be made on 'any person * * * who has any of its property in charge.' The language there was much broader than in the present statute. Moreover in that case the corporation was doing business in Utah, and the person served was in its employ and had property in his possession pertaining to its general business and the business transacted by it in Utah. The authorities cited by counsel on both sides are based upon special statutes, some upholding and some denying jurisdiction under facts in some respects similar to the facts in this case, with the exception that in every case the person served was connected in some way with the general business of the corporation, and in every case the courts held that the corporation was transacting some business within the state where the person was served. The strongest case in favor of appellants is that of *Nelson Morris & Co. v. Rehkopf & Sons*, 75 S. W. 203, a Kentucky case. But even in that case it was held that the corporation was doing business within the state, and the person served was directly connected with the business. Other cases are *Abbeville Elec. Light & Power Co. v. Western Elec. Supply Co.*, 61 S. C. 361, 39 S. E. 559, 55 L. R. A. 146, 85 Am. St. Rep. 890; *Ryerson v. Wayne* Circuit Judge, 114 Mich. 352, 72 N. W. 131. The other cases cited by counsel for appellants are distinguishable from the case at bar upon other grounds than those in question here. The following cases hold to the view that service of process upon a person

other than one representing the corporation in some capacity, will not confer personal jurisdiction. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *U. S. v. A. Bell Tel. Co.*, 29 Fed. 17-37; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635. We remark here that in the case reported in 106 U. S. 350, the Supreme Court of the United States arrived at a conclusion directly opposite to the one reached in 114 Mich., supra, in passing upon the same identical statute. While it is both important and desirable that our citizens should be permitted to have recourse to their own courts for redress of grievances against all persons, including foreign corporations, this fact alone cannot confer jurisdiction. To permit personal jurisdiction to be exercised upon service such as was had in the case at bar, would ultimately lead to a perversion of justice rather than a furtherance thereof. No man could safely come to Utah with any property in his possession belonging to a foreign corporation; no attorney or banker could present an account for collection or adjustment, the property of a foreign corporation, without subjecting such corporation to the hazard of defending any and all kinds of claims preferred by any and all kinds of persons, whether resident or nonresident. If it is to be the policy of this state to make its courts the instruments through which all claims against foreign corporations not actively engaged in business in the state, and by all persons, can be litigated, then the legislature, and not the courts, should declare that policy."

within the state certain hides, as its representative, forwarding the purchaser's order to the foreign corporation, which accepted it and filled it, the order being subject to its approval, the business was carried on in the state, and the cause of action arose therein, and such broker, by whatever name he might designate his business, was the agent of the corporation in charge of its business within the meaning of the statute, and service of process upon him in an action against the foreign corporation was sufficient.⁹⁹

Under a statute providing for the service of summons upon a foreign corporation by delivering a copy within the state to the president, treasurer or secretary or officer performing corresponding functions, or a person designated by the corporation, and if none is designated, then to the cashier, a director or managing agent of the corporation within the state, it is held that the service of process upon one who was the agent in the very transaction out of which the suit arises is sufficient to confer jurisdiction upon the court in the action.¹ Under a statute providing that when a corporation, com-

⁹⁹ *Nelson Morris & Co. v. Rehkopf & Sons*, 25 Ky. L. Rep. 352, 75 S. W. 203.

Where the salesman is not agent of the corporation, but an independent contractor, service upon him in an action against the foreign corporation is not sufficient to give the court jurisdiction over it. *Barnes v. Maxwell Motor Sales Corporation*, 172 Ky. 409, 189 S. W. 444.

¹ *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352, 43 L. R. A. (N. S.) 1015; *Estes v. Belford*, 22 Fed. 275; *Aetna Ins. Co. v. Black*, 80 Ind. 513; *Pugh v. A. D. Bothne*, 178 Iowa 601, 159 N. W. 1030; *Morey v. Standard Separator Co.*, 174 Iowa 530, 156 N. W. 719; *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407, 78 N. W. 45; *Locke v. Chicago Chronicle Co.*, 107 Iowa 390, 78 N. W. 49; *Gillespie v. Commercial Mut. Marine Ins. Co.*, 12 Gray (Mass.) 201, 71 Am. Dec. 743.

Under Cal. Code Civ. Proc. § 411, service of process may be made upon the secretary of a foreign corporation who was in the state representing the corporation in the execution of a con-

tract made in the state and for the breach of which the action is brought. *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, 200 Fed. 352, 43 L. R. A. (N. S.) 1015.

Where a foreign fire insurance corporation does business in a state without compliance with its statutory requirements in reference to the appointment and authorization of a person residing in the state to acknowledge or receive service of process, the service of process in an action on a fire insurance policy may be made upon the agent in the state through whom the policy of insurance was effected. The court said: "The defendant company delivered the contract and collected the premium thereon through its said agent within this jurisdiction, and it must be held that he continued to be the agent of this company for all the purposes of said contract until the final determination thereof, unless something to the contrary is shown. The fact that he invaded the territorial jurisdiction of Missouri without compliance with its statutory demands cannot excuse him

pany or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency, a person whose place of business in the state was used as a distributing point or agency for the sale of goods of a foreign corporation and who was employed by it as a salesman and who is compensated by an agreed commission on sales made by him, is an agent upon whom process may be served in an action against the corporation.² Under a statute providing that any foreign corporation found doing business in the state shall be subject to suit there to the same extent that domestic corporations are liable to suit, so far as relates to any transaction had in whole or in part within the state, or in case of action arising in the state, but not otherwise, and that process may be served on any agent of such corporation that is within the county where the suit is brought, no matter what character of agent such person may be, and in the absence of such agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arising took place, it was held that service upon the resident attorney at law of a foreign corporation did not confer jurisdiction over the corporation where he had been simply retained, and had transacted no business for it in the state.³ Service upon an attorney who had appeared in another action in the state for a foreign corporation has been held not sufficient

or the company he represented from the obligations of the contract. Were this otherwise, a party would be permitted to take advantage of his own violations of the law to escape its rightful obligations." *Funk v. Anglo-American Ins. Co.*, 27 Fed. 336.

² *Morey v. Standard Separator Co.*, 174 Iowa 530, 156 N. W. 719. The court said: "It is admitted that defendant employed plaintiff with the agreement or understanding that it would from time to time ship from Milwaukee to Hosmer at Des Moines goods of the kind which plaintiff undertook to sell 'so that plaintiff and other agents would have a nearby depot or base of supply for the rapid and ready distribution of the goods sold'; that defendants did in fact send

goods to Hosmer for that purpose, and that orders taken by plaintiff were filled in this manner through the agency of Hosmer. The language of the statute is quite broad and general, and permits the service of notice to be made not only where the action grows out of the business of the agency, but also where it is 'connected with' such business. The admitted business relation or connection of this agency with the business out of which this relation has arisen brings the case within the scope of the statute, and the service of notice on Hosmer was sufficient."

³ *Thach v. Continental Travelers' Mut. Acc. Ass'n*, 114 Tenn. 271, 87 S. W. 255.

to confer jurisdiction.⁴ But under a statute providing that service of process can be made upon a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in the state personally upon the president, cashier, treasurer, attorney or secretary or any agent thereof, in an action by a resident of the state to set aside a judgment obtained against him by a foreign corporation, service on the attorney who represented the corporation when the judgment was obtained and who was endeavoring to collect, was held to be sufficient.⁵ A sales agent acting for a foreign corporation without apparent authority to represent it and without connection of any kind with the cause of action is not a person upon whom a citation in admiralty can be served in an action arising out of a breach of contract of delivering by the defendant corporation as consignee.⁶

A statute providing that service of process in an action against a foreign corporation having an office or doing business in the state may be made by delivering a copy of the writ and petition to any officer or agent of the corporation in charge of any office or place of business for it, or if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained, is comprehensive enough to include a corporation in the term "agent," and if a foreign corporation transacts business in the state through the agency of another corporation, it may under the statute be served with process through that agency, and service upon the corporation acting as agent must be in the manner of serving corporations in their own behalf.⁷ A corporation may be the agent of a foreign corporation within the meaning of a statute authorizing service of process upon agents of foreign corporations doing business in the state.⁸ Service on a domestic corporation, organized by a

⁴ *Philp v. Covenant Mut. Ben. Ass'n*, 62 Iowa 633, 17 N. W. 903.

⁵ *Sellers v. Home Fertilizer Chemical Works*, 76 S. C. 313, 56 S. E. 978.

⁶ *Hefner v. American Tube & Stamping Co.*, 163 Fed. 866.

⁷ *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069.

As to whether service on an agent of a domestic corporation is sufficient service upon a foreign corporation whose property it has purchased, see *Carter Coal Co. v. Clouse*, 163 Ky. 337, 173 S. W. 794.

⁸ *State v. Pennsylvania Steel Co. of Philadelphia*, 123 Md. 212, 91 Atl. 136, holding that a domestic corporation which was the exclusive sales agent of a foreign manufacturing corporation for the sale of its product within the state, and which received a commission on such sales, and maintained on the door of its office and on its stationery the name of the foreign corporation, is an agent for the service of process in an action against the foreign corporation, although the agent corporation paid the rent of such office.

foreign corporation and all of the stock in which was owned by such foreign corporation for which the domestic corporation acted as agent, is not service upon the foreign corporation.⁹

Service of process upon one who has never been the agent of a foreign corporation confers no jurisdiction over the corporation.¹⁰ Nor is service of process on a person whose only connection with the foreign corporation was a contingent one which had ceased before the commencement of the action, sufficient to confer jurisdiction.¹¹

§ 6031. Exclusiveness of statutory method of service. There is a conflict of authority as to whether a statute requiring a foreign corporation to designate an agent for the service of process in actions against it is exclusive of every other mode of service or cumulative. By one line of authorities it is held that such a statute is not exclusive but cumulative, and does not prevent service of process upon an agent or officer of a corporation which is transacting business within the state when such agent or officer is in the state representing the corporation.¹² Thus it is held that where a foreign corporation conducts a regular business in the state at a permanent place of

See *Castell v. Sterling Fire Ins. Co.* (N. Y. Misc.), 126 N. Y. Supp. 692, aff'd 146 N. Y. App. Div. 878, 130 N. Y. Supp. 1106, holding that where a foreign corporation which was authorized to do business in the state acted as the agent of another foreign corporation which was not so authorized, service of process upon a representative of the former corporation was not sufficient to give jurisdiction over the latter corporation.

⁹ *Robert Dollar Co. v. Canadian Car & Foundry Co., Limited*, 100 N. Y. Misc. 564, 166 N. Y. Supp. 34.

¹⁰ *Teal v. Philadelphia & G. S. S. Co.*, 139 La. 194, 71 So. 364.

¹¹ *Haas v. Security Ins. Co.*, 57 N. J. L. 388, 30 Atl. 430.

See § 6045, *infra*.

¹² *United States. Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987; *Henrietta Mining & Milling Co. v. Johnson*, 173 U. S. 221, 43 L. Ed. 675, aff'g 5 Ariz. 222, 81 Pac. 1126; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43

L. Ed. 569, aff'g 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145; *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508; *Johnson v. Hanover Fire Ins. Co.*, 15 Fed. 97; *Moch v. Virginia Fire & Marine Ins. Co.*, 10 Fed. 696.

Alabama. *Prayter v. Northen*, 195 Ala. 191, 70 So. 156; *Eagle Life Ass'n v. Redden*, 121 Ala. 346, 25 So. 779.

Colorado. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, overruling 15 Colo. App. 495, 63 Pac. 1061.

Iowa. *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407, 78 N. W. 45; *Green v. Equitable Mut. Life & Endowment Ass'n*, 105 Iowa 628, 75 N. W. 635.

Kansas. *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077; *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560.

Kentucky. *Callahan Const. Co. v. Williams*, 160 Ky. 814, 170 S. W. 203; *Cumberland Co. v. Lewis*, 32 Ky. 1300, 108 S. W. 347.

business, a service of process made at such place of business upon its

Louisiana. *In re Curtis*, 115 La. 918, 5 L. R. A. (N. S.) 298, 112 Am. St. Rep. 284, 40 So. 334.

Nevada. *Daly v. Lahontan Mines Co.*, 39 Nev. 14, 151 Pac. 514, where, however, the statute authorizing service provided that it should not be exclusive, but cumulative. But see *Karns v. State Bank & Trust Co.*, 31 Nev. 170, 101 Pac. 564.

New York. *Silver v. Western Assur. Co.*, 3 App. Div. 572, 38 N. Y. Supp. 335; *Howard v. Prudential Ins. Co.*, 1 App. Div. 135, 37 N. Y. Supp. 832; *Quade v. New York, N. H. & H. R. Co.*, 39 N. Y. St. Rep. 157, 14 N. Y. Supp. 875; *Richardson v. Western Home Ins. Co.*, 29 N. Y. St. Rep. 820, 8 N. Y. Supp. 873. See, however, *Travis v. Railway Education Ass'n*, 33 Misc. 577, 68 N. Y. Supp. 893.

North Carolina. *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913; *Jones v. Hartford Ins. Co.*, 88 N. C. 499.

South Carolina. *Littlejohn v. Southern Ry. Co.*, 45 S. C. 96, 22 S. E. 761.

Tennessee. *Connecticut Mut. Life Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145, aff'd 172 U. S. 602, 43 L. Ed. 569.

Texas. *Missouri, K. & T. Ry. Co. v. Demere & Coggin*, — Tex. Civ. App. —, 145 S. W. 623; *Bankers' Union of World v. Nabors*, 36 Tex. Civ. App. 38, 81 S. W. 91.

Washington. *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161.

In *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623 (overruling 15 Colo. App. 495, 63 Pac. 1061), it was said: "It is clearly within the power of the state to provide through the general assembly what agents of corporations doing business within her limits may be served with process, provided, of course, that such provisions are reasonable, and the service pro-

vided for shall be upon such agents as may be properly deemed representatives of such foreign corporations. Our general assembly has made provision for this purpose, which embraces any agent of foreign corporations engaging in business in this state. We therefore conclude that the provisions of the Constitution and statute referred to, requiring foreign corporations who desire to engage in business in this state to appoint an agent upon whom process may be served, does not limit the service of process upon such agent, but that it may be served upon any other agent contemplated by the provisions of the Civil Code. * * * There are authorities cited by counsel for plaintiffs which appear to hold contrary to our conclusion, but upon examination it will be found that they turn either upon a construction of the provisions relating to service of process upon foreign corporations, from which the conclusion is deduced that such provisions are exclusive, or are grounded upon the doctrine, now discarded, that a foreign corporation could not be served with summons in an action in personam outside of the state of its creation, in the absence of a statute expressly authorizing this mode of service, from which views it necessarily followed that, when the legislature provided a mode of acquiring jurisdiction over foreign corporations, that mode was exclusive."

In holding that a statute requiring a foreign corporation doing business in the state to appoint an agent upon whom service of process in actions against the corporation might be made, and providing for service of process upon such corporation when it had no legally constituted agent in the state, did not prevent the service of process upon a foreign corporation as pro-

agent in connection with a matter growing out of such business is good if the same service would be good as against a domestic corporation, notwithstanding a statute requiring such corporations to appoint an agent upon whom service of process may be made, and also authorizing service to be made upon the secretary of state, as such statutes did not provide an exclusive, but an additional, mode of service.¹³ Under a statute requiring a foreign corporation to file a written designation of an agent upon whom process may be served, and that where it fails to make such designation, service of process may be made upon the agent in the state acting for the corporation in the transaction out of which the cause of action arose, it is held that service may be made upon any agent of the corporation within the state even though he was not so designated and not the agent acting for the corporation in the transaction upon which the suit was based.¹⁴ Where a foreign insurance corporation does business in a state without compliance with the laws of the state requiring it to

vided by another statute relating to the service of process against corporations generally, the Supreme Court of the United States said: "If, as contended by the plaintiff in error, the remedy against the foreign corporation be confined to service of process upon such appointed agent, it results that, if the corporation does not choose to file such appointment, intending suitors are confined to the remedy by publication provided for by section 712 * * *, which under the decisions of this court, would be ineffectual to sustain a personal judgment. * * * It is incredible that the legislature should have intended to limit its own citizens to such an insufficient remedy, when the corporation is actually doing business in the territory and is represented there by a managing or local agent." *Henrietta Mining & Milling Co. v. Johnson*, 173 U. S. 221, 43 L. Ed. 675, aff'g 5 Ariz. 222, 81 Pac. 1126, and distinguishing *Southern Building & Loan Ass'n v. Hallum*, 59 Ark. 583, 28 S. W. 420; *Lewis v. Northern R. R. Co.*, 139 Mass. 294, 1 N. E. 546; *Desper v. Continental Water Meter Co.*, 137 Mass.

252, and *State v. United States Mut. Acc. Ass'n*, 67 Wis. 624, 31 N. W. 229.

¹³ *In re Curtis*, 115 La. 918, 5 L. R. A. (N. S.) 298, 112 Am. St. Rep. 284, 40 So. 334.

¹⁴ *American Cotton Oil Co. v. Beasley*, 116 Fed. 256.

Where it is provided by statute that certain corporations shall file with the insurance commissioner of the state a power of attorney, authorizing the secretary of state to acknowledge service of process for and in behalf of such corporations in suits brought against them in the courts of the state, and by another statute provision is made for the service of process upon the resident agents of the corporations in all actions growing out of the business of the corporations, it is held that it was not the purpose of the former statute to prevent such corporation from being served with process in the ordinary way where they have a resident agent, but to provide an additional mode of obtaining jurisdiction which might be available if such company had no resident agent. *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508.

designate a resident agent to acknowledge and receive service of process, and upon whom process may be served in actions against the corporation, service of process may be made upon the agent of the company in the state through whom the corporation did business in that state.¹⁵

According to another view, where a foreign corporation, pursuant to the requirements of an act of the legislature, appoints an attorney in fact or other representative upon whom process should be served, the statutory method thus prescribed is exclusive and service of the summons upon any other agent is ineffectual.¹⁶

¹⁵ *Funk v. Anglo-American Ins. Co.*, 27 Fed. 336.

"The defendant contends that the Maine statute 'prescribes the exclusive method for service' upon foreign corporations doing business within the state. Whether or not this view was adopted by the District Court does not appear, no opinion having been filed. Under a state statute of this kind, going no further than to provide that process 'may be served' upon the agent appointed in accordance with its requirements, and imposing no penalty for failure to appoint any such agent, it has been held that the method of service established is not exclusive and that valid service may be made upon any agent within the state sufficiently representative in character. *Henrietta, etc., Co. v. Johnson*, 173 U. S. 221, 19 Sup. Ct. 402, 43 L. Ed. 675. Although the Maine statute here in question does impose such a penalty, and although the language of one of its clauses is that service of process 'shall be made' by leaving a copy in the appointed agent's hands or in his office, we are not prepared to hold that under no circumstances is service upon any other agent or representative of a nonresident corporation to be recognized as valid. That this was the legislative intent does not seem to us sufficiently clear from the above features of the Maine statute." *Boulton v. International Paper Co.*, 229 Fed. 951.

¹⁶ *United States. McCullough v. United Grocers' Corporation*, 247 Fed. 880, and *Beach v. Kerr Turbine Co.*, 243 Fed. 706, construing Gen. Code Ohio, § 11290.

Arkansas. *Brookfield v. Boynton Land & Lumber Co.*, 127 Ark. 306, 192 S. W. 215; *Union Guaranty & Trust Co. v. Craddock*, 59 Ark. 593, 28 S. W. 424; *Southern Building & Loan Ass'n v. Hallum*, 59 Ark. 583, 28 S. W. 420. See *Lesser Cotton Co. v. Yates*, 69 Ark. 396, 63 S. W. 997, holding that a statute providing for service upon the agents of foreign corporations was not repealed by the enactment of a statute requiring such corporations to designate agents for the service of process.

Indiana. *Rehm v. German Ins. & Sav. Institution*, 125 Ind. 135, 25 N. E. 173.

Maryland. *Oland v. Agricultural Ins. Co.*, 69 Md. 248, 14 Atl. 669.

Massachusetts. *Thayer v. Tyler*, 10 Gray 164.

Michigan. *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441.

Minnesota. *Guernsey v. American Ins. Co.*, 13 Minn. 278.

Missouri. *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 827; *Stone v. Travelers' Ins. Co.*, 78 Mo. 655; *Baile v. Equitable Fire Ins. Co.*, 68 Mo. 617.

Ohio. *Smith v. Hoover*, 39 Ohio St. 249; *State v. King Bridge Co.*, 28 Ohio Cir. Ct. 147; *Goode v. Druggist Ass'n*, 16 Ohio Dec. 586; *Barney v. New Al-*

§ 6032. **Service upon designated person in absence of certain officers or agents.** By some of the statutes it is provided that where certain officers or agents of a foreign corporation cannot be found within the state, process in an action against the corporation may be served upon some other person as the representative of the corporation.¹⁷ Under a statute providing that service of process

bany & S. R. Co., 1 Handy 571, 12 Ohio Dec. 295.

Oklahoma. Waters Pierce Oil Co. v. Foster, 52 Okla. 412, 153 Pac. 169; Gulf Pipe Line Co. v. Vanderberg, 28 Okla. 637, 34 L. R. A. (N. S.) 661, Ann. Cas. 1912 D 407, 115 Pac. 782; Bes Line Const. Co. v. Taylor, 16 Okla. 481, 85 Pac. 713; Bes Line Const. Co. v. Schmidt, 16 Okla. 429, 85 Pac. 711. Compare Continental Ins. Co. v. Hull, 38 Okla. 307, 132 Pac. 657.

Oregon. Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 213, 1099.

Pennsylvania. Liblong v. Kansas Fire Ins. Co., 82 Pa. St. 413; Connors v. Prudential Ins. Co., 11 Pa. Co. Ct. 50; Insurance Co. v. Rogers, 3 L. T. (N. S.) 117; Hewes v. Howe Mach. Co., 2 Leg. Rec. 210. See also Sobrio v. Manhattan Life Ins. Co., 72 Fed. 566.

17 United States. Chinn v. Foster-Milburn Co., 195 Fed. 158; Honeyman v. Colorado Fuel & Iron Co., 133 Fed. 96; Reilly v. Philadelphia & R. Ry. Co., 109 Fed. 349; Meyer v. Pennsylvania Lumbermen's Mut. Fire Ins. Co., 108 Fed. 169.

Colorado. Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623; Colorado Iron Works v. Sierra Grande Min. Co., 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Florida. Seacoast Lumber Co. v. R. J. & B. F. Camp Lumber Co., 63 Fla. 604, 59 So. 13.

Indiana. Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527; Debs v. Dalton, 7 Ind. App. 84, 34 N. E. 236.

Kansas. American Bonding Co. of Baltimore v. Dickey, 74 Kan. 791, 88 Pac. 66.

Nebraska. Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

Nevada. Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

New York. Childs v. Harris Mfg. Co., 104 N. Y. 477, 11 N. E. 50; Swift v. Matthews Engineering Co., 178 App. Div. 201, 165 N. Y. Supp. 136; Kowalchek v. Buck Run Coal Co., 173 App. Div. 653, 160 N. Y. Supp. 98; Burke v. Galveston, H. & H. R. Co., 173 App. Div. 221, 159 N. Y. Supp. 379; Karosas v. Susquehanna Coal Co., 172 App. Div. 873, 158 N. Y. Supp. 1021; Doherty v. Evening Journal Ass'n, 98 App. Div. 136, 90 N. Y. Supp. 671; Vitolo v. Bee Pub. Co., 66 App. Div. 582, 73 N. Y. Supp. 273; Perrine v. Ransom Gas Mach. Co., 60 App. Div. 32, 69 N. Y. Supp. 698; McCulloh v. Paillard Non-Magnetic Watch Co., 20 Civ. Proc. 386, 14 N. Y. Supp. 491.

Utah. Saunders v. Sioux City Nursery, 6 Utah 431, 24 Pac. 532.

See § 6031, supra.

Under a statute providing that process against a foreign corporation may be served upon the president, presiding officer, chairman of the board of trustees or other chief officer, or if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent, service upon an agent doing business for it and in its name is sufficient to

against a foreign corporation doing business within the state may be made on an agent, cashier, or secretary, president, or other head thereof, and another statute requiring foreign corporations to designate agents for the service of process, it was held that in an action to enforce a mechanic's lien against a foreign corporation service might be made upon its manager, though he had not been appointed its agent for the service of process.¹⁸

Where such a statute obtains, the return must show that due diligence was exercised to obtain service upon the officers or agents previously enumerated, otherwise service upon the latter agent or class of agents will not be upheld.¹⁹ Where service is allowed on one

bind the corporation when there was no president or presiding or other officer, cashier, treasurer, secretary or clerk of the corporation found in the county. *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

¹⁸ *Daly v. Lahontan Mines Co.*, 39 Nev. 14, 151 Pac. 514, 158 Pac. 285.

¹⁹ *United States. Chinn v. Foster-Milburn Co.*, 195 Fed. 158; *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

Colorado. *Comet Consol. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506.

Florida. See *Seacoast Lumber Co. v. R. J. & B. F. Camp Lumber Co.*, 63 Fla. 604, 59 So. 13.

Nebraska. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462.

Nevada. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597.

New York. *Swift v. Matthews Engineering Co.*, 178 App. Div. 201, 165 N. Y. Supp. 136; *Karosas v. Susquehanna Coal Co.*, 172 App. Div. 873, 158 N. Y. Supp. 1021; *Doherty v. Evening Journal Ass'n*, 98 App. Div. 136, 90 N. Y. Supp. 671; *Vitolo v. Bee Pub. Co.*, 66 App. Div. 582, 73 N. Y. Supp. 273; *Travis v. Railway Educational Ass'n*, 33 Misc. 577, 68 N. Y. Supp. 893.

Under a statute providing that if a suit is brought against a foreign corporation service of process shall be

made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, treasurer, or general agent thereof, but if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation, it is held that service upon the vice president of the corporation is sufficient to confer jurisdiction upon the court over the corporation, and the certificate of return on the summons need not state that the president could not be found in the county though in case of service upon a stockholder, the return should show that none of the officers enumerated was within the county where the service was had, as under the statute there could be no service upon a stockholder except upon a failure to find an agent in the county. *Comet Consol. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506; *Venner v. Denver Union Water Co.*, 15 Colo. App. 495, 63 Pac. 1061.

By statute in New York it is provided that personal service of the summons upon a foreign corporation must be made by delivering a copy thereof within the state: (1) To the president, vice president, treasurer, assistant treasurer, secretary or assistant secretary; or if the corporation lacks either of these officers, to the officer performing corresponding func-

person only where some other person cannot be found, the proof of service must, where service is made upon the second person, show that the first could not be found. In other words, where service is allowed to be made upon a particular person or officer only upon condition, the return must show the existence of the condition, or it is not sufficient.²⁰

tions, under another name. (2) To a person designated for the purpose by the corporation. (3) If such designation is not in force, or if neither the officer designated, nor any of the officers above specified can be found with due diligence, and the corporation has property within the state or the cause of action arose therein, to the cashier, a director, or a managing agent, within the state. Code Civ. Proc. N. Y. § 432. Under this provision it must be shown, not only that there has been no designation of a person on whom service may be made, but that none of the general officers named can with due diligence be found, that the corporation has property within the state, or that the cause of action arose in this state. These are conditions precedent which must be shown in order to justify service upon a managing agent. *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96; *Swift v. Matthews Engineering Co.*, 178 N. Y. App. Div. 201, 165 N. Y. Supp. 136; *Karosas v. Susquehanna Coal Co.*, 172 N. Y. App. Div. 873, 158 N. Y. Supp. 1021; *Willcox v. Philadelphia Casualty Co.*, 136 N. Y. App. Div. 626, 628, 121 N. Y. Supp. 368; *Doherty v. Evening Journal Ass'n*, 98 N. Y. App. Div. 136, 90 N. Y. Supp. 671; *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273; *Birkenwald v. May Co.*, 166 N. Y. Supp. 1073.

It was held that the plaintiff exercised due diligence to obtain service of process upon the officers of a foreign corporation, which had not designated an agent for the service of proc-

ess, so as to warrant service upon one of its directors within the state, when he called at the office of the secretary and was informed by the clerk in charge of such office that no officers of the corporation upon whom process could be served were within the state, and was given by the clerk the names of several directors who could be found within the state and upon whom process could be served. *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

Under a statute providing that where the defendant is a foreign corporation, and has no acknowledged agent in the state, service may be made on such agent, or, if no such agent is found, on any person in its employ, or who has any of its property in charge, it was held that service of process could be made upon a person who was at the time of service an attorney of the foreign corporation, and employed in the collection of certain claims due it, and then intrusted by it with the possession of certain of its property, where the evidence showed that the officer before making service on the attorney, made diligent search for another agent of the defendant on whom to make it, but was unable to find one in the state. *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

²⁰ *Willey v. Benedict Co.*, 145 Cal. 601, 79 Pac. 270; *Seacoast Lumber Co. v. R. J. & B. F. Camp Lumber Co.*, 63 Fla. 604, 59 So. 13; *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 325, 53 Pac. 597; *Glines v. Supreme Sitting Order of Iron Hall*, 22 N. Y. Civ. Proc. 437, 20 N. Y. Supp. 275.

Under a statute providing that process may be served upon certain of the officers of a foreign corporation, and if none of the officers enumerated can be found, then service can be made upon any person authorized to transact business in the name of the corporation, and in case the foreign corporation defendant has no such officer, person, or agent, resident in the state, service may be made in the same manner as against other nonresidents, service may be made upon the general superintendent of a foreign corporation temporarily within the state as the agent and representative of the corporation and engaged in the transaction of business for it, where the corporation had no officers or agents within the state upon whom process in an action against it might be served.²¹

§ 6033. Service upon designated state official. Some of the statutes provide that service of process in an action against a foreign corporation doing business in the state may be made upon a designated state official, or that if a foreign corporation doing business in the state shall fail to maintain therein an agent to receive service of process service may be made upon a designated state official.²² The

For return of service made upon general manager of foreign corporation in absence of other specified officers or agents held to be sufficient, see *Chinn v. Foster-Milburn Co.*, 195 Fed. 158.

Service upon the treasurer of a defendant foreign corporation in an action brought against it in the Municipal Court of Chicago is proper if it is certified that the president of such corporation was not found "in the City of Chicago." The certification need not include the county of Cook. *Burr v. Co-operative Const. Co.*, 162 Ill. App. 512.

²¹ *Rush v. Foos Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143.

²² *United States v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492; *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *St. Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144, aff'g 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951,

51 S. E. 865; *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987, aff'g 112 Fed. 453, 61 L. R. A. 717; *Henrietta Min. & M. Co. v. Johnson*, 173 U. S. 221, 43 L. Ed. 675; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, aff'g 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145; *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485; *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687; *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386; *Simon v. Southern Ry. Co.*, 195 Fed. 56; *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367; *Vance v. Pullman Co.*, 160 Fed. 707; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537; *Davis v. Kansas & T. Coal Co.*, 129 Fed. 149; *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617; *Millan v. Mutual Reserve Fund Life Ass'n*, 103 Fed. 764; *Friedman v. Empire Life Ins. Co.*, 101 Fed. 535; *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922; *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen*

object of such statutes is to enable the courts of a state in which a

Mills, 82 Fed. 508; Sparks v. National Masonic Acc. Ass'n, 73 Fed. 277; Youmans v. Minnesota Title Insurance & Trust Co., 67 Fed. 282; Romaine v. Union Ins. Co., 55 Fed. 751; Hazeltine v. Mississippi Valley Fire Ins. Co., 55 Fed. 743; Farmer v. National Life Ass'n of Hartford, Connecticut, 50 Fed. 829; Knapp, Stout & Co. v. National Mut. Fire Ins. Co., 30 Fed. 607; Ehrman v. Teutonia Ins. Co., 1 McCrary 123, 1 Fed. 471.

Arkansas. Vulcan Const. Co. v. Harrison, 95 Ark. 588, 130 S. W. 583; Masons' Fraternal Acc. Ass'n v. Riley, 60 Ark. 478, 31 S. W. 148; Union Guaranty & Trust Co. v. Craddock, 59 Ark. 593, 28 S. W. 424.

California. Olender v. Crystalline Min. Co., 149 Cal. 482, 86 Pac. 1082; Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270; Winston v. Idaho Hardwood Co., 23 Cal. App. 211, 137 Pac. 601; Holiness Church of San José v. Metropolitan Church Ass'n, 12 Cal. App. 415, 107 Pac. 633.

Georgia. Equity Life Ass'n v. Gammon, 118 Ga. 236, 44 S. E. 978.

Indiana. Modern Woodmen of America v. Noyes, 158 Ind. 503, 64 N. E. 21; Rehm v. German Ins. & Sav. Institution, 125 Ind. 135, 25 N. E. 173; Old Wayne Mut. Life Ass'n v. Flynn (Ind. App.), 66 N. E. 57.

Iowa. Greaves v. Posner, 111 Iowa 651, 82 N. W. 1022; Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa 628, 75 N. W. 635; Sparks v. National Masonic Acc. Ass'n, 100 Iowa 458, 69 S. W. 678.

Kansas. Mutual Reserve Fund Life Ass'n v. Boyer, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387; Westchester Fire Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682; German Ins. Co. of Freeport v. Hall, 1 Kan. App. 43, 41 Pac. 69.

Kentucky. Aetna Ins. Co. v. Com., 106 Ky. 864, 45 L. R. A. 355, 51 S. W.

624; Germania Ins. Co. v. Ashby, 23 Ky. L. Rep. 1564, 65 S. W. 611; Home Benefit Soc. of New York v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520; American Fire Ins. Co. v. Bland, 19 Ky. L. Rep. 287, 40 S. W. 670.

Louisiana. The Fair v. American Union Fire Ins. Co., 135 La. 48, 64 So. 977; Milwaukee Trust Co. v. Germania Ins. Co., 106 La. 669, 31 So. 298.

Massachusetts. Enterprise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206.

Michigan. Wells v. United States Fidelity & Guaranty Co. of Baltimore, 160 Mich. 213, 125 N. W. 57.

Minnesota. State v. Queen City Fire Ins. Co., 114 Minn. 471, 131 N. W. 628; State v. Brotherhood of American Yeoman, 111 Minn. 39, 126 N. W. 404; Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

Missouri. Curfman v. Fidelity & Deposit Co. of Maryland, 167 Mo. App. 507, 152 S. W. 126; United States Mut. Acc. Ins. Co. v. Reisinger, 43 Mo. App. 571.

Nevada. Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Lonkey v. Keyes Silver Min. Co., 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57.

New York. Laffin v. Traveler's Ins. Co., 121 N. Y. 713, 24 N. E. 934; McKeever v. Supreme Court Independent Order of Foresters, 122 App. Div. 465, 106 N. Y. Supp. 1041; People v. Commercial Alliance Life Ins. Co., 7 App. Div. 297, 40 N. Y. Supp. 269; Silver v. Western Assur. Co., 3 App. Div. 572, 38 N. Y. Supp. 335; Howard v. Prudential Ins. Co., 1 App. Div. 135, 37 N. Y. Supp. 832; Quinn v. Royal Ins. Co., 81 Hun 207, 30 N. Y. Supp. 714; Farmer v. National Life Ass'n, 67 Hun 119, 21 N. Y. Supp.

foreign corporation has engaged in business to render personal judgment against the foreign corporation where it withdraws its agents from the state. Under statutes providing for service of process only upon agents or officers of foreign corporations, foreign corporations may come into the state, transact business, commit wrongs against its citizens, for which the only remedy is an action for damages, and before service can be made upon the agent or other officer named in the statute, such agent or officer can be withdrawn from the state, and leave the injured party practically without remedy. Statutes providing for the acquisition of jurisdiction over foreign corporations by service of summons by publication, where no agent or officer of the corporation is found in the state upon whom process might be served, are likewise ineffective, for the power of the court, in cases of default, is limited under well-settled rules to rendering judgment in rem. Manifestly legislation of the character under consideration is salutary, and necessary to remedy such defects.²³ Such legislation is held to

1056; *South Pub. Co. v. Fire Ass'n*, 67 Hun 41, 21 N. Y. Supp. 675; *Klein Bros. & Co. v. German Union Fire Ins. Co.*, 66 Misc. 538; 123 N. Y. Supp. 1082; *Johnston v. Mutual Reserve Life Ins. Co.*, 43 Misc. 251, 87 N. Y. Supp. 438, aff'd 45 Misc. 316, 90 N. Y. Supp. 539; *People v. Justices' City Court of New York*, 33 N. Y. St. Rep. 147, 11 N. Y. Supp. 773; *Richardson v. Western Home Ins. Co.*, 29 N. Y. St. Rep. 820, 8 N. Y. Supp. 873.

North Carolina. *Currie v. Golconda Mining & Milling Co.*, 157 N. C. 209, 72 S. E. 980; *Fisher v. Trader's Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667; *Mutual Reserve Fund Life Ass'n v. Scott*, 136 N. C. 157, 48 S. E. 581; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 S. E. 955; *Cunningham v. Southern Exp. Co.*, 67 N. C. 425.

Oklahoma. *Municipal Pav. Co. v. Herring*, 50 Okla. 470, 150 Pac. 1067.

Rhode Island. *Lubrano v. Imperial Council of Order of United Friends*, 20 R. I. 27, 38 L. R. A. 546, 37 Atl. 345,

Tennessee. *D'Arcy v. Mutual Life Ins. Co.*, 108 Tenn. 567, 69 S. W. 768; *Connecticut Mut. Life Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145, aff'd 172 U. S. 602, 43 L. Ed. 569.

Vermont. *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278.

West Virginia. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

Wisconsin. *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248; *Piney v. Providence Loan & Investment Co.*, 106 Wis. 396, 50 L. R. A. 577, 80 Am. St. Rep. 41, 82 N. W. 308.

As to the sufficiency of the allegation that officer served had been designated as corporation's agent for service, see *Mitchell v. National Surety Co.*, 206 Fed. 807.

²³ *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597; *McKeever v. Supreme Court Independent Order of Foresters*, 123 App. Div. (N. Y.) 465, 106 N. Y. Supp. 1041. See also *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987.

be constitutional.²⁴ A statute providing that, if a foreign corporation doing business therein shall fail to maintain therein an agent to receive service of process, it shall be bound by service of process upon a designated state official of the state is held to be constitutional, and not in violation of the constitutional provision that no state shall make any law depriving any person of his property without due process of law.²⁵ But a statute which authorizes a personal judgment against a foreign corporation on any cause of action in favor of a resident or citizen of the state upon service of a summons upon the auditor of the state is unconstitutional where it authorizes judgment without the notice to the defendant of the hearing and proposed adjudication in his case, as such notice is indispensable to constitute due process of law.²⁶ Where the statute authorizing service of process upon the

²⁴ See § 5902, *supra*.

²⁵ **United States.** *St. Mary's Franco-American Petroleum Co. v. West Virginia*, 203 U. S. 183, 51 L. Ed. 144, *aff'g State v. St. Mary's Franco-American Petroleum Co.*, 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38, 51 S. E. 865; *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386; *Vance v. Pullman Co.*, 160 Fed. 707.

California. *Olender v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082.

Louisiana. *Milwaukee Trust Co. v. Germania Ins. Co.*, 106 La. 669, 31 So. 298.

North Carolina. *Fisher v. Travelers' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667.

West Virginia. *State v. St. Mary's Franco-American Petroleum Co.*, 58 W. Va. 108, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951, 6 Ann. Cas. 38, 51 S. E. 865.

²⁶ *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *King Tomopah Min. Co. v. Lynch*, 232 Fed. 485; *Southern Ry. Co. v. Simon*, 184 Fed. 959; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537.

In *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537, Sanborn, J., pointed out that while it is true that where "a state

provides by law that one of the conditions under which a foreign corporation may do business therein is that the summons in an action against it may be served upon an agent whom it appoints, and, in case that it makes no appointment, upon an officer of the state, and the corporation engages in business in the state, it thereby accepts the offer and the condition of the state and consents to such service and to the jurisdiction of the courts of that state to render judgments against it thereon," on the other hand, where no such condition or offer of condition to do business in the state upon service of process upon an official of the state is made by legislative enactment of the state nor accepted by the foreign corporation, a legislative enactment of the state which attempts to give jurisdiction, by service upon such official, over foreign corporations which have not entered the state for the purpose of doing business therein as well as over foreign corporations which have so done, and which does not render it incumbent upon the state official to forward or otherwise give notice of the receipt of the process to the foreign corporation, is unconstitutional, in that it authorizes judgment without that notice of the proposed adjudi-

state official does not make it his duty to notify the foreign corporation of the pendency of the action, or that through him it has been regularly served with process, such service cannot be deemed personal or the equivalent of personal service, in the absence of a clear intention by the legislation to that effect.²⁷ A statute requiring every foreign corporation to file with the secretary of state a designation of an agent for the service of process, and providing that in the event of the failure of the foreign corporation so to do, process may be served upon the secretary of state, but which makes no provision for the giving of notice by him to the corporation of the fact that he has been served with process in an action against it, is violative of the due process clause, and is, to the extent that it provides for service of process on the secretary of state, void.²⁸

cation which is essential to due process of law. "A state has jurisdiction over the property within its boundaries," said the court, "and to the extent necessary to justly apply that property it may by attachment thereof before hearing and by a substituted service of a summons upon its owner vest in its courts the power to render a judgment against the owner by virtue of which the attached property and that property only can be seized and administered by its court.

* * * But in the absence of consent to substituted service and in the absence of property of the defendant in the state, which is the subject or object of the action, nothing short of service of a summons upon the defendant personally within the state, or his appearance in the action, constitutes that due process of law which will give the necessary jurisdiction to a court of the state to render a personal judgment against a nonresident."

Where a statute which authorizes a personal judgment against any foreign corporation on any cause of action in favor of a resident or citizen of the state upon service of a summons upon the auditor of the state is unconstitutional because it authorizes a personal judgment against a foreign corporation not doing any business in

the state without personal service upon it or its appearance in the action, it cannot be upheld as to foreign corporations which are doing business in the state. In other words, where a statute covers by general language foreign corporations which are doing business in the state and foreign corporations which are not engaged in business therein, the latter class may not lawfully be excepted from the operation of the law, nor may the statute be lawfully limited by judicial construction to the former class and then sustained, because such a course would make a new law which the original statute clearly indicates that the legislature did not intend to enact, and because it is impossible to separate such a statute into a constitutional part and an unconstitutional part, each of which may be read and may stand by itself. *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537.

²⁷ *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 12 Cal. App. 445, 107 Pac. 633; *Gouner v. Mississippi Valley Bridge & Iron Co.*, 123 La. 964, 49 So. 657. See, however, *Olender v. Crystalline Min. Co.*, 149 Cal. 482, 86 Pac. 1082.

²⁸ *Knapp v. Bullock Tractor Co.*, 242 Fed. 543.

Under a statute providing that service of summons may be made upon a state official under certain circumstances, it is held that service of process on the deputy of such official is unauthorized and gives no jurisdiction.²⁹

Under a statute providing that no foreign insurance company shall transact business in the state until it has complied with the insurance laws and appointed in writing the superintendent of the insurance department to be its true and lawful attorney upon whom process for the commencement of actions may be served with the same effect as if the company existed in the state, the name of the superintendent need not be inserted in the power of attorney, but it is sufficient to follow the statute and appoint the superintendent of the insurance department, as such by his official name.³⁰

²⁹ *Simon v. Southern Ry. Co.*, 195 Fed. 56, aff'g 184 Fed. 959; *Old Wayne Mut. Life Ins. Co. v. Flynn* (Ind. App.), 66 N. E. 57; *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57. See, however, *Quinn v. Royal Ins. Co.*, 81 Hun (N. Y.) 207, 30 N. Y. Supp. 714; *South Pub. Co. v. Fire Ass'n*, 67 Hun (N. Y.) 41, 21 N. Y. Supp. 675.

Under a statute providing that where a foreign corporation shall fail to designate an agent for the service of process, service may be had upon the secretary of state, it was held that service of process upon the deputy secretary of state was insufficient to confer jurisdiction upon the court, and that an affidavit to the effect that a copy of the summons attached to a certified copy of the complaint and made pursuant to a statute that in a suit against a corporation organized under the laws of the state by which the corporation was created, such a copy should be mailed to the president and trustees of such corporation at their place of business in the state, added no force to the return as made by the officer on the summons. *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57. The court said that "as the return of the sheriff shows that the service of

process was made upon the deputy secretary of state, we cannot presume that it was also made upon the secretary, or that it was made upon an agent or officer of the corporation, or that the service of summons was had by publication, the statute requiring that the judgment roll shall contain the affidavit or return of service."

It was held in Wisconsin, under a statute providing that in an action against a foreign corporation service may be made upon the secretary of state only when the cause of action arises out of business transacted in the state or where the defendant has property therein, that service upon the assistant secretary of state is sufficient to bind the corporation where part of the business out of which the cause of action arose was transacted within the state. *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

³⁰ *Laffin v. Travelers' Ins. Co.*, 121 N. Y. 713, 24 N. E. 934. See also *Goodwin v. Colorado Mortg. Inv. Co.*, 110 U. S. 1, 28 L. Ed. 47.

It is also held that a power of attorney filed under such a statute does not render the appointment invalid because it appointed the superintendent, or "his successor in office," as it is clearly an appointment of the present superintendent and whoever may

There is a difference of opinion as to the effect of the failure of foreign corporation doing business in the state to appoint a designated state official its agent to receive service of process, as required by statute. In some jurisdictions it is held that a foreign corporation doing business in the state without complying with the provisions of the statute by appointing such state official its agent for the service of process will be presumed to have assented that service of process may be made upon him in an action against it, and will be bound by such service,³¹ and that where such statutes obtain and a foreign corporation does business in the state, it will be presumed that it has complied with the law.³² In pursuance of this principle, it is held that where a

at any time be his successor, and it would be hypercritical to give the language any other meaning. *Lafflin v. Travelers' Ins. Co.*, 121 N. Y. 713, 24 N. E. 934.

³¹ *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537; *Knapp, Stout & Co. v. National Mut. Fire Ins. Co.*, 30 Fed. 607; *Modern Woodmen of America v. Noyes*, 158 Ind. 503, 64 N. E. 21; *Old Wayne Mut. Life Ass'n v. Flynn* (Ind. App.), 66 N. E. 57; *Sparks v. National Masonic Acc. Ass'n*, 100 Iowa 458, 69 N. W. 678.

³² *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419, 8 L. R. A. (N. S.) 537; *Sparks v. National Masonic Acc. Ass'n*, 73 Fed. 277, following *Ehrman v. Teutonia Ins. Co.*, 1 McCrary 123, 1 Fed. 471; *Knapp, Stout & Co. v. National Mut. Fire Ins. Co.*, 30 Fed. 607.

See § 6020, supra.

In holding that under a statute providing that any foreign insurance company desiring to transact any business in the state shall file with the superintendent of the insurance department a power of attorney authorizing said superintendent to acknowledge or receive service of process and upon whom process may be served for and in behalf of such company, ac-

cording to the laws of that or any other state, a foreign corporation, which had not appointed the superintendent of insurance its agent to receive service of process as required by the statute, could not successfully urge after it had transacted business in the state that service upon the superintendent while it was doing business in the state was insufficient and that a judgment rendered on such service without the appearance of the company in the suit was a nullity, the Iowa court said: "That it is within the power of the state to prescribe the method by which corporations doing business within it may be brought into court, and to designate the officer or agent, either of the corporation or of the state, upon whom proper process may be served, is well settled. * * * We think that when a foreign insurance company is shown to have transacted business in a state wherein by statute certain acts are required to be done by such company before it has the right to transact business therein, a conclusive presumption arises that the company has complied with the requirements of the law in that respect. Under such circumstances, the company ought not to be allowed to plead, and show its own violation of law as a defense to an action brought upon the policy. To

statute provides that one of the conditions under which a foreign corporation may do business therein is that the summons in an action against it may be served upon an agent which it appoints, and, in case that it makes no appointment, upon an officer of the state, and the corporation engages in business in that state, it thereby accepts the offer and condition of the state and consents to such service and to

so permit would be inviting it to take advantage of its own wrongful act, perpetrate a fraud upon those who may deal with it in good faith, and in proper reliance upon the fact that the company had conformed to the law which authorizes it to transact business. * * * We are aware of the fact that some courts have held that service made upon a state officer under such circumstances as exist in this case does not confer jurisdiction. We are not prepared, however, to assent to the soundness of such holdings which induce fraud, and render the company violating the law secure in the possession of funds taken from the assured, for which he either has received no consideration, or is thereby compelled to seek redress in some other jurisdiction. There can be no valid reason why this company, which voluntarily entered the state of Missouri, and solicited and obtained business there, in defiance of the laws of that state, should be permitted to shield itself from liability in this action behind the very illegal act by means of which it was enabled to obtain the money of the deceased. To so hold would be equivalent to offering a premium for the continuance of such illegal practices. Having received all the benefits which would have resulted from a compliance with the laws of the state of Missouri, this company seeks to repudiate its obligation because in prosecuting its business it was a wrong-doer. Such a doctrine is abhorrent to our sense of right and justice, and the law looks not with favor upon one who thus seeks to rob

the assured, or those to whom the policy is payable, of the protection it should afford. It is said that some of the cases cited above are not applicable, because there is no provision in the Missouri statutes for service on a foreign corporation which does business in that state without complying with its laws. The contention is of no force. The reasoning upon which the conclusion is based in those cases is quite as applicable when the facts are like those in the case at bar." *Sparks v. National Masonic Acc. Ass'n*, 100 Iowa 458, 69 N. W. 678.

In *Knapp, Stout & Co. Company v. National Mut. Fire Ins. Co.*, 30 Fed. 607, Mr. Justice Brewer said: "In these cases a default is asked. The petition alleges that the defendant is a foreign insurance corporation, doing business in this state, having agents and offices located here. Service was made upon the insurance commissioner. He declined to receive the summons and copy of the petition that was handed him, no reason being given therefor. The service was good, if he had the power to receive the service. The law of Missouri forbids any foreign insurance company doing business until it has filed with the insurance commissioner a certificate stipulating that service upon him shall be personal service upon the company. As it is alleged in the petition that the company was doing business in this state, having agents and offices here, we are to presume that it has complied with the law; and therefore, *prima facie*, at least, the service is good, and default will be entered."

the jurisdiction of the courts of that state to render judgments against it: therein.³³

In other jurisdictions it is held that where the foreign corporation has failed to designate the state official its attorney for the service of process against it and has not entered its appearance in the action, the court has no jurisdiction to render a personal judgment against it.³⁴ Thus under a statute providing that the auditor of the state shall be the attorney in fact for and in behalf of every foreign corporation doing business in the state, and that every such corporation shall, by power of attorney, appoint said auditor and his successors in office, attorney in fact to accept service of process and notice for such corporation, and by the same instrument declare its consent that any service of process or notice in the state on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon the corporation, it is held that unless the corporation constitutes the state auditor its attorney in fact by expressly appointing him as

33 United States. Cella Commission Co. v. Bohlinger, 147 Fed. 419, 8 L. R. A. (N. S.) 537; Sparks v. National Masonic Acc. Ass'n, 73 Fed. 277; Knapp, Stout & Co. Company v. National Mut. Fire Ins. Co., 30 Fed. 607; Ehrman v. Teutonia Ins. Co., 1 McCrary, 123, 1 Fed. 174.

Arkansas. Masons' Fraternal Acc. Ass'n v. Riley, 60 Ark. 578, 31 S. W. 148.

Indiana. Modern Woodmen of America v. Noyes, 158 Ind. 503, 64 N. E. 21; Old Wayne Mut. Life Ass'n v. Flynn (Ind. App.), 66 N. E. 57.

Iowa. Greaves v. Posner, 111 Iowa 651, 82 N. W. 1022; Sparks v. National Masonic Acc. Ass'n, 100 Iowa 458, 69 N. W. 678.

Kansas. German Ins. Co. of Freeport v. Hall, 1 Kan. App. 43, 41 Pac. 69.

See § 6020, *supra*.

Under a statute requiring foreign insurance companies before being authorized to do business in the state to file a written stipulation agreeing that any legal process affecting the company served on the auditor, or the

party designated by him, or the agent specified by the company to receive process for the company, should have the same effect as if served personally upon the company within the state, it was held that where a foreign insurance company did business in the state without filing such stipulation, service made upon the auditor of state in an action against the corporation was binding upon the corporation. Masons' Fraternal Acc. Ass'n v. Riley, 60 Ark. 678, 31 S. W. 148.

34 United States. Knapp v. Bullock Tractor Co., 242 Fed. 543; Vance v. Pullman Co., 160 Fed. 707.

California. Winston v. Idaho Hardwood Co., 23 Cal. App. 211, 137 Pac. 601.

Georgia. Equity Life Ass'n v. Gammon, 118 Ga. 236, 44 S. E. 978.

Massachusetts. Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206.

Rhode Island. Lubrano v. Imperial Council of Order of United Friends, 20 R. I. 27, 38 L. R. A. 546, 37 Atl. 345.

such as provided by the statute, service of process on the auditor is insufficient to authorize a personal judgment against the foreign corporation.³⁵

³⁵ *Vance v. Pullman Co.*, 160 Fed. 707.

In a Rhode Island case the court after reviewing the cases holding that a foreign corporation is estopped to deny that it has appointed the state official its attorney to accept service, as required by statute, after having done business in the state, and holding that where the defendant makes no appearance in the action, no question of estoppel can properly be raised or considered, said: "It will thus be seen that in those cases where the defendant appeared and pleaded to the jurisdiction, by setting up the fact that it had not appointed some one authorized by it to accept service of process, as required by statute, the courts uniformly held that this could not be allowed, the defendant being estopped from setting up its own misconduct. It will also be seen that in those cases where judgment was rendered by default the return on the writ showed a valid service prima facie, and nothing was brought upon the record by the plaintiff to contradict the same, so that the court was fully warranted in exercising its jurisdiction; that is to say, the court, having no knowledge to the contrary, was bound to presume that the defendant had discharged its statutory duty by appointing the person therein designated as its agent to accept service, and hence that service upon such person was good. Here, however, no such presumption can be said to arise, in the face of the record before us, which shows that, as a matter of fact, the defendant had not complied with the statute first above quoted; and hence the court cannot stultify itself by holding that any such presumption exists. Indeed, it would be absurd to

say that a presumption arises as to the existence of a certain jurisdictional fact when the court is judicially informed that it does not exist. So that, even recognizing the full force and authority of the decisions cited in support of the plaintiff's position, yet we do not think that in the circumstances aforesaid, they are decisive of the question before us. The case of *Knapp v. National Mut. Ins. Co.*, 30 Fed. 607, is clearly in point. That was a case in the United States Circuit Court of Missouri, where the statutory requirement as to the appointment of the insurance commissioner by a foreign corporation doing business in the state is similar to the one here. Service of the writ was made upon said insurance commissioner, who declined to receive the summons and copy of the petition which was handed to him, but he gave no reason therefor. No appearance was entered by the defendant, and the plaintiff asked for a default. The court (Brewer, J.) held that the service was good if the insurance commissioner had power to receive the same, and that, as it was alleged in the petition that the company was doing business in the state, having agents and officers there, the court would presume that it had complied with the law, and therefore prima facie, at least, the service was good, whereupon a judgment by default was entered. Had it come to the knowledge of the court, however, from the plaintiff's own showing, as it does in the case before us, that, as a matter of fact, said commissioner was not authorized to receive service of the writ, it is evident that the court would have held that there was no service, and hence no jurisdiction."

Under a statute requiring foreign corporations doing business or owning property within the state to appoint and keep in the state an agent upon whom all legal process against the corporation may be served, and providing that in case of their failure to comply with such requirement, then service of process may be made upon the secretary of state, it is held that the failure to keep an agent in the state upon whom service of process could be made should be affirmatively shown by the record, where service of process is made upon the secretary of state.³⁶

Lubrano v. Imperial Council of Order of United Friends, 20 R. I. 27, 38 L. R. A. 546, 37 Atl. 345, distinguishing *Sparks v. National Masonic Acc. Ass'n*, 73 Fed. 277; *Moch v. Virginia Fire & Marine Ins. Co.*, 10 Fed. 696; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary 123, 1 Fed. 471; *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 24 L. R. A. 490, 58 N. W. 9, and *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278.

In *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 23 L. R. A. 863, 42 Am. St. Rep. 418, 37 N. E. 206, in an action on a judgment rendered in another state against a foreign corporation which had not designated the state official as its agent for the service of process as required by statute, it was held that the court had no jurisdiction to render a personal judgment against the corporation where the service of process was made upon the state official and the corporation did not appear, and had no notice or knowledge of the suit until long after the rendition of the judgment, the court saying: "We do not consider the decision of the county court in Arkansas in the original action an exposition of the statute which is authoritative and binding upon us, and we are not inclined to follow the case of *Ehrman v. Teutonia Insurance Co.*, 1 Fed. 471, 1 McCrary 123, in which it is held that the defendant was estopped to deny the jurisdiction. That case differed from this, inasmuch

as the defendant there had notice of the suit, and appeared and sought to set up a want of jurisdiction, although perhaps this difference is not very material. We do not doubt the doctrine that a corporation doing business in a foreign state thereby subjects itself to the statutes of that state. * * * But it seems to us that the question before us is not whether the defendant would be estopped from setting up its failure to comply with the law to relieve itself from liability under its contract, but whether the plaintiff presents a case which comes within the terms of the statute on which the jurisdiction of the court must be founded. Unless the statute applies to a case like this, the service was improperly made, and it is as if there had been no service. In our opinion, unless the stipulation is filed, a foreign insurance company has no right to do business in the state; and, if it violates the law in that respect, no service can be made upon the auditor, and no jurisdiction can be obtained on which to found a judgment against it. The remedy provided is by a punishment of the corporation and of such others as have disregarded the requirements of the statute. Suits may be brought upon the contracts in any state where jurisdiction can be obtained."

³⁶ *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597.

A certificate of the return of the sheriff that process was duly served

Unless limited by the terms of the statute authorizing such service upon a state official, process may be served upon a foreign corporation in any form of proceeding against it.³⁷

In order to render a personal judgment against a foreign corporation based upon service of process upon a prescribed state official, it is essential that the corporation be engaged in doing business in the state,³⁸ and such service is insufficient where the cause of action arose in another jurisdiction and the defendant made no appearance.³⁹

A written admission of the service of process issued against a foreign insurance company by the state insurance commissioner upon whom service in such case may, under the statute, be made, is sufficient to confer jurisdiction upon the court.⁴⁰ Under a statute providing

upon the secretary of state and that there were no agents of the foreign corporation, as required by the statute, in the county where the action was brought, is insufficient. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597.

³⁷ *Lyden v. Western Life Indemnity Co.*, 204 Fed. 687; *German-American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531, qualifying *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *State v. Queen City Fire Ins. Co.*, 114 Minn. 471, 131 N. W. 628; *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

Laws 1907, c. 345, § 19, providing for service on foreign insurance companies through the insurance commissioner of "any legal process in any action or proceeding" includes process of mandamus. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

Garnishment is included in the word "process" in How. St., § 4368, relating to foreign insurance companies and providing for service on the insurance commissioner. *German-American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531, qualifying *Milwaukee Bridge & Iron Works v.*

Wayne County Circuit Judge, 73 Mich. 155, 41 N. W. 215.

³⁸ *Webster v. Iowa State Traveling Men's Ass'n*, 165 Fed. 367; *Hazeltine v. Mississippi Valley Fire Ins. Co.*, 55 Fed. 743; *Greaves v. Posner*, 111 Iowa 651, 82 N. W. 1022.

See §§ 6005, 6021, *supra*.

³⁹ *Simon v. Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492; *Eastern Products Corporation v. Tennessee Coal, Iron & Railroad Co.*, 102 N. Y. Misc. 557, 170 N. Y. Supp. 100.

⁴⁰ *Eastern Products Corporation v. Tennessee Coal, Iron & Railroad Co.*, 102 N. Y. Misc. 557, 170 N. Y. Supp. 100, in holding that under a statute providing that where a foreign corporation doing business in the state has no agent to accept service of process, it may be served upon the secretary of state in an action upon a liability incurred within the state and also providing for similar service where the corporation has property in the state, service of process upon the secretary of state, after the agent designated by the defendant corporation had died, was not effectual in conferring jurisdiction of the foreign corporation in an action based upon a liability arising out of the state, *Bijur, J.*, said: "I am unable to follow the argument of plaintiff's counsel which

that no foreign insurance company shall do business in the state until it has filed with a certain state official a written stipulation agreeing that any legal process affecting the company may be served upon a designated state official, and that so long as any liability of the stipulating company to any resident of the state continues, such stipulation cannot be revoked or modified except that a new one may be appointed, it is held that the stipulation is irrevocable for any cause as to all its outstanding liabilities growing out of any policies made in the state while the stipulation or any renewal thereof is in force.⁴¹ Under a statute providing that every foreign corporation having a usual place of business in the state shall appoint in writing the commissioner of

appears to suggest that, notwithstanding the provisions of law above quoted, defendant is liable to service of process through service upon the secretary of state alone in an action upon a liability incurred outside of the state. Plaintiff's counsel's reference to *Bagdon v. Philadelphia & R. C. & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916 F 407, seems to me to be entirely inept. The service of process discussed in that case was upon the agent actually designated by the foreign corporation, and the opinion of the court by Cardozo, J., lays particular stress upon the considerations that the stipulation designating a person upon whom process may be served within this state is therefore 'a true contract.' The person designated is a true agent. The consent that he shall represent the corporation is a 'real consent.' The very contrary is true of the case at bar. The person served, namely, the secretary of state, is not the agent designated by the defendant. He is not, therefore, as described in the *Bagdon* case, its 'true agent,' nor is there any 'real consent.' The agency of the secretary of state and the consent that he be served are purely constructive, arising out of the operation of the statute. It seems to be well settled that service upon such an agent of process in an action based on liability

arising without the state is futile. See *Simon v. Southern R. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; *Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 115 N. E. 711; *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910."

As to when such an admission is not sufficient to show jurisdictional facts, see *McKeever v. Supreme Court Independent Order of Foresters*, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041.

⁴¹ **United States.** *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987; *Davis v. Kansas & T. Coal Co.*, 129 Fed. 149; *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617; *McCord Lumber Co. v. Doyle*, 97 Fed. 22.

Iowa. *Green v. Equitable Mut. Life & Endowment Ass'n*, 105 Iowa 628, 75 N. W. 635.

Kentucky. *Germania Ins. Co. v. Ashby*, 23 Ky. L. Rep. 1564, 65 S. W. 611; *Home Benefit Soc. of New York v. Muehl*, 22 Ky. L. Rep. 1378, 59 S. W. 520.

Louisiana. *The Fair v. American Union Fire Ins. Co.*, 135 La. 48, 64 So. 977.

Minnesota. *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

foreign corporations or his successor in office to be its attorney upon whom lawful process may be served in any action or proceeding against it, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same force or validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in the state, it is held, in an action by a nonresident that service of process on the commissioner of corporations gives the court jurisdiction over a foreign corporation having filed such appointment, even though it had ceased to do business in the state, if at the time of the bringing of the suit it had existing liabilities in the state.⁴² The fact that a foreign insurance company had at one time transacted business in the state under a license issued by the superintendent of insurance and that it had filed in his office, as required by the statute, its "written consent, irrevocable," to the institution of suit against it in the courts of the state and the issuance of summons against it directed to the superintendent of insurance, does not subject it to suit in the state upon a policy of insurance wholly executed in another state, if previous to the issuance of such policy it had withdrawn or been expelled from the state, and had entirely ceased to do business therein.⁴³ The effect of the withdrawal of the foreign corporation from the state or its ceasing to do business therein upon the right conferred by statute to serve process upon the state official is considered elsewhere.⁴⁴

Whether statutes designating the method of service of process against foreign corporations doing business in the state are exclusive is considered elsewhere.⁴⁵

A statute requiring that every foreign corporation doing business in the state shall designate some person residing in the state upon whom process may be served, and file such designation in the office of the secretary of state, in which case it shall be lawful to serve process against the corporation upon such person, and in the event no such person is designated, the service may be made upon the secretary of state, is held to be a radical departure from the ordinary method of procedure whereby jurisdiction is obtained over a defendant, and, for that reason, having due regard for the protection of the personal

⁴² *Youmans v. Minnesota Title, Insurance & Trust Co.*, 67 Fed. 282.

See § 6046, *infra*, where this question is more fully considered.

⁴³ *Mutual Reserve Fund Life Ass'n v. Boyer*, 62 Kan. 31, 50 L. R. A. 598,

61 Pac. 387, distinguished in *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

⁴⁴ See § 6046, *infra*.

⁴⁵ See § 6031, *supra*.

and property rights of a defendant, before the court can assume jurisdiction of the corporation under the substituted process which the statute provides for, there must be a strict compliance with its provisions.⁴⁶ Thus under a statute providing that, in a suit against a foreign corporation doing business in the state, service of process may be made upon the secretary of state, in the event of a failure of the corporation to appoint and keep an agent within the state upon whom service may be made, where service of process is made upon the secretary of state, the return of the service should affirmatively show that the corporation had not appointed an agent within the state, upon whom service might be made under the statute, and a return which fails to affirmatively show such fact is insufficient to give the court jurisdiction.⁴⁷ Such a statute, in so far as making service upon the secretary of state is concerned, prescribes a condition, namely, that the records of his office disclose that no person has been designated by the corporation for the service of process. If there is a designated person, service must be made upon him. If there is none, then on the secretary of state; but the right to serve the latter is conditioned solely on the nonexistence of the former.⁴⁸ A certificate of the secretary of the state to the effect that the defendant corporation had designated no person upon whom service might be made, attached to the summons as returned, does not aid the return where the statute does not provide for any such certificate in aid of the return.⁴⁹ Where, under the statute, the record in cases of judgment by default consists of the summons, with affidavit or proof of service, the complaint with a memorandum indorsed thereon of the defendant's default and a copy of the judgment, such a certificate, which does not pretend to be and is no part of the return of the sheriff, is no part of the record and is no evidence in aid of the return, and it cannot be availed of on a motion to quash the service of summons of the secretary of state on the ground that it did not appear from the return that the foreign corporation had not designated any person upon whom process against it might be served.⁵⁰

Under a statute forbidding any foreign insurance company doing

⁴⁶ Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

⁴⁷ Cairo & F. R. Co. v. Trout, 32 Ark. 17; Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270; Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Glines v. Supreme Sitting Order of Iron Hall, 22 N. Y.

Civ. Proc. R. 437, 20 N. Y. Supp. 275.

⁴⁸ Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

⁴⁹ Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

⁵⁰ Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

business in the state until it has filed with the insurance commissioner a certificate stipulating that service upon him shall be personal service upon the company, it is held that the fact that he declined to receive the summons and copy of the petition that were handed to him, no reason being given therefor, will not invalidate the service, if he had power to receive the same.⁵¹

§ 6034. Service where agent designated is plaintiff in suit against corporation. A statute providing for the service of process upon any agent of a foreign corporation need not contain an exception, as to actions brought against it by its agent, that process served on such agent will render such service void.⁵² Service of process on an agent, otherwise competent, whose relations to the plaintiff or to the claim are such as to make it to his interest to suppress the fact of service is insufficient.⁵³ One to whom the loss under a policy may become payable on his interest appearing is disqualified thereby as agent for service.⁵⁴

⁵¹ Knapp, Stout & Co. Company v. National Mut. Fire Ins. Co., 30 Fed. 607.

⁵² Rehm v. German Ins. & Sav. Institution, 125 Ind. 135, 25 N. E. 173; Byers v. Union Cent. Life Ins. Co., 17 Ind. App. 101, 46 N. E. 475; North British & Mercantile Ins. Co. v. Storms, 6 Tex. Civ. App. 659, 24 S. W. 1122. See § 3004, supra. See also Knapp v. Bullock Tractor Co., 242 Fed. 543.

"The proposition that, under any circumstances, the defendant to an action may be compelled to appear and answer, or be subjected to a judgment upon a default, upon service of process upon his adversary, is so out of line with all of our ideas of right and the mode of procedure in the courts of justice that we cannot for a moment suppose that the legislature ever intended to authorize such a proceeding." Rehm v. German Ins. & Sav. Institution, 125 Ind. 135, 25 N. E. 173.

Where a resident director of a foreign corporation, having a claim against it for services rendered and moneys advanced by him to it, as-

signed his claim to a friend who instituted suit in his name against the corporation purely as a matter of accommodation to his assignor, who was to receive the benefits of the suit, it was held that service of process on the assignor as a resident director of the foreign corporation was ineffectual to bind the corporation. Tortat v. Hardin Min. & Mfg. Co., 111 Fed. 426. See also Knapp v. Bullock Tractor Co., 242 Fed. 543; White House Mountain Gold Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679; People v. Feicke, 252 Ill. 414, 96 N. E. 1052; Atwood v. Sault Ste. Marie Light, Heat & Power Co., 148 Mich. 224, 118 Am. St. Rep. 576, 111 N. W. 747; United States Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S. E. 342. See also § 3004, supra.

⁵³ King Tonopah Min. Co. v. Lynch, 232 Fed. 485, citing Atwood v. Sault Ste. Marie Light, Heat & Power Co., 148 Mich. 224, 118 Am. St. Rep. 576, 111 N. W. 747.

⁵⁴ North British & Mercantile Ins. Co. v. Storms, 6 Tex. Civ. App. 659, 24 S. W. 1122.

§ 6035. Service on "managing agent," "superintendent," etc., other than executive officers. The service of process upon the "managing agent," "agent in charge of" an office or place of business, "general agent," "superintendent," etc., of corporations generally has been fully considered elsewhere in this work.⁵⁵

Under a statute providing that if an action be against a private corporation the summons shall be served by delivering a copy thereof to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent, but such service can be made in respect to a foreign corporation only where it has property in the state, or the cause of action arose therein or where such service shall be made within the state personally upon the president, treasurer, secretary, or duly authorized agent thereof, it is held that the service of summons upon the managing agent of a foreign corporation, in the state, constitutes a valid service, when such corporation has property within the state, or the cause of action arose therein.⁵⁶ A mortgage-loan company which makes its securities payable at a designated agency in another state than that by which it was created, pays them there and appoints a trustee resident in such other state to receive and hold its securities in trust for the payment of its obligations made payable there, and which deposits its securities with the trustee for such purpose, is doing business in such other state and is amenable to suit there by the service of summons upon its president or other managing officer casually found in the state.⁵⁷

Much discussion may be found in the cases upon the question who is a "managing agent" of a foreign corporation on whom service of process may be made under a statute providing for service upon such an agent of a foreign corporation; and it is one upon which there is some disagreement.⁵⁸ While the later decisions are more liberal in interpreting the term "managing agent" than were the earlier ones,⁵⁹ who is a "managing agent" of a foreign corporation, on whom service of summons may be made, must depend in every case upon the kind of business conducted by the corporation, what the general duties of the supposed "managing agent" are, and whether it can be fairly said that service on such agent would bring notice to the corporation.⁶⁰

⁵⁵ See §§ 2994, 2995, *supra*.

⁵⁶ *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

⁵⁷ *J. B. Watkins Land-Mortg. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385, 62 Pac. 1004.

⁵⁸ *Federal Betterment Co. v. Reeves*,

73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560.

⁵⁹ *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560. See also *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919.

⁶⁰ *Federal Betterment Co. v. Reeves*,

"The object to be attained in the service of process is to give the defendant notice of the suit. The federal courts in fixing the status of the persons who have been served with process issued against a corporation have had this constantly in view. Are the relations of the party served to the defendant of such a character that the service will surely give notice to the defendant? Is he clothed by the defendant with such general powers and duties that he is, in fact, the alter ego of the defendant? He may be called the corporation's entomologist or engineer or attorney, but if in fact he be clothed with general powers to act for the corporation, he becomes, *pro hac vice*, its managing agent."⁶¹ It may be stated as a general principle that such managing agent must be in charge and have the management of some department of the business of the corporation, the management of which requires of the agent the exercise of an independent judgment and discretion; not that he shall be not under the general direction of the corporation—all agents are subject to the general control of their principals—but in the management of his particular department he shall have authority to manage and conduct it as his discretion and judgment direct. He must be in the exclusive and immediate control and management of that department of the entire works conducted at the place where he is in charge.⁶² Where a statute does not specify the

73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560. See §§ 2994, 2995, *supra*.

⁶¹ *Geo. Wm. Bentley Co. v. Chivers & Sons*, 215 Fed. 959.

⁶² *Federal Betterment Co. v. Reeves*, 73 Kan. 107, 4 L. R. A. (N. S.) 460, 84 Pac. 560. See also *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220. See § 2994, *supra*.

The general definition of the term "managing agent" has been laid down in *Taylor v. Granite State Provident Ass'n*, 136 N. Y. 343, 32 Am. St. Rep. 749, 32 N. E. 992, as follows: "A managing agent must be some person invested by the corporation with general powers involving the exercise of judgment and discretion, as distinguished from an ordinary agent or attorney, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of his duty and the manner of executing it." This defini-

tion was followed in *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 128 N. W. 35; *Beck v. North Packing & Provision Co.*, 159 N. Y. App. Div. 418, 144 N. Y. Supp. 602; *Dimond-Warren Motor Co., Inc. v. Herff-Brooks Corporation*, 158 N. Y. Supp. 1. In *Palmer v. Chicago Evening Post*, 85 Hun (N. Y.) 403, 32 N. Y. Supp. 992, while the definition was adopted in a general way, it was somewhat limited in its application.

"After a careful consideration of the authorities * * * we are convinced that the weight of authority and the better rule is to the effect that an agent of a foreign corporation, whose contract of agency demands of him the exercise of judgment in the business matters of his principal, and who has charge of the business of his principal in the territory covered by his contract, is a managing agent within the meaning of a statute

extent of the agency required in order to bind a foreign corporation

providing for the service of summons upon the managing agent of a foreign corporation." *Ord Hardware Co. v. J. I. Case Threshing Mach. Co.*, 77 Neb. 847, 8 L. R. A. (N. S.) 770, 110 N. W. 551.

In *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9, the court quoted with approval *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360, saying: "While the term 'managing agent' has no strict legal definition, and it is not easy to formulate or lay down a general rule that will govern all cases, yet we are of the opinion that the facts in this case show that both *Fairchild* and *Wihlborg* were 'managing agents,' within the meaning of the statute. The latest and perhaps the most satisfactory definition of a managing agent is that laid down by the Court of Appeals of New York in *Tuchband v. Railroad Co.*, *supra*. The court says: * * * 'The defendant, like other railroad corporations, necessarily has not only directors, a treasurer, and secretary, but other officers and agents. By those persons, or, under their direction, by others, the business of the company is conducted. From the very nature of a body corporate, service of process cannot be personal, and at common law it was made by serving it on a proper officer; so that it might come to the knowledge of the company, and then further proceedings by distress. 1 Tidd. Pr. 121. Under the statute (*supra*) the same object was in view; and when the corporation has an office in this state where a substantial portion of its business is transacted by a person designated by itself as a "general agent," although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of

course, intends a managing agent in this state; and, where a corporation created by the laws of any other state does business in this state, the person, who, as its agent, does that business, should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, a managing agent. * * * So far as the cases cited by the appellant hold a contrary doctrine, they cannot be approved. To limit service by requiring the person served, in case of an action against a railroad corporation, to be one who controls "the general and practical operations and business of running the road," would so restrict the meaning of the statute as to render it useless. Such an agent would naturally find his occupation and engagement in the state where the road was domiciled or operated; and if his incidental presence in this state subjected him to process, as representing the corporation, it cannot be supposed that the legislature intended to confine the remedy to him alone.' "

Under a statute providing that service of process may be made on a foreign corporation in certain cases by leaving a copy of the summons with its "managing agent" in the state, it is held that "it is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employee, who acted in an inferior

by service of summons, except that the person must be a "managing or business agent," it is obvious that this does not mean that it must be the general managing agent of the corporation. The object of the service is attained when the agent is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made.⁶³

capacity, and under the direction and control of superior authority, both in regard to the extent of the work, and the manner of executing the same. The distinction thus attempted to be drawn would seem to be reasonable and in harmony with the obvious purpose of the statute in regard to the service of process upon a foreign corporation. It would, indeed, be a great hardship to allow actions to be commenced against a foreign corporation by the service of a summons upon an inferior agent or servant, who, by reason of ignorance or heedlessness, would be quite likely not to apprehend the purpose of such service and therefore neglect the same." *Reddington v. Mariposa Land & Mining Co.*, 19 Hun (N. Y.) 405, quoted with approval and distinguished in *Jackson v. Schuylkill Silk Mills*, 92 N. Y. Misc. 442, 156 N. Y. Supp. 219; *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

In *Clinard v. White*, 129 N. C. 250, 39 S. E. 960, the court said: "It appearing that the plaintiff resides in the state, and also that the cause of action arose herein, service upon a foreign corporation is to be made in the same manner as upon resident corporations, to wit, by delivering a copy of the summons to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent; and a local agent is defined by the said section to mean a person receiving or collecting moneys

within the state for or on behalf of the corporation. No statutory definition being given to 'managing' agent, we must give it that meaning generally recognized by lexicographers. To 'manage' (the verb from which the adjective 'managing' is derived) is defined by Mr. Webster to mean 'to direct; to govern; control; wield; order,' etc.; hence, 'to direct affairs; to carry on business or affairs.' "

63 *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77. See also:

United States. *Geo. Wm. Bentley Co. v. Chivers & Sons, Ltd.*, 215 Fed. 959; *Hat-Sweat Mfg. Co. v. Davis Sew-Mach. Co.*, 31 Fed. 294; *United States v. American Bell Tel. Co.*, 29 Fed. 117.

Colorado. *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771.

Missouri. *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

Nebraska. *Ritchie v. Illinois Cent. R. Co.*, 87 Neb. 631, 128 N. W. 35; *Ord Hardware Co. v. J. I. Case Threshing Mach. Co.*, 77 Neb. 847, 8 L. R. A. (N. S.) 770, 110 N. W. 551; *Fremont, E. & M. V. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159, 59 L. R. A. 939, 92 N. W. 131; *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537, 68 N. W. 929; *Porter v. Chicago & N. W. Ry. Co.*, 1 Neb. 14.

New York. *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, aff'g 174 App. Div. 866, 159 N. Y. Supp. 1145; *Coler v. Pittsburgh Bridge*

A person who has full charge of the business of a foreign corporation

Co., 146 N. Y. 281, 40 N. E. 779, rev'g 84 Hun 285, 32 N. Y. Supp. 439; *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360, aff'g 53 Hun 629, 5 N. Y. Supp. 493; *Persons v. Buffalo City Mills*, 29 App. Div. 45, 51 N. Y. Supp. 645; *Palmer v. Chicago Evening Post Co.*, 85 Hun 403, 32 N. Y. Supp. 992; *Reddington v. Mariposa Land & Mining Co.*, 19 Hun 405; *Jackson v. Schuylkill Silk Mills*, 92 Misc. 442, 156 N. Y. Supp. 219; *Russell v. Pittsburgh Life Insurance & Trust Co.*, 62 Misc. 403, 115 N. Y. Supp. 950; *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. 183; *Doykos v. Montgomery, Ward & Co.*, 127 N. Y. Supp. 227.

North Dakota. *Bauer v. Union Cent. Life Ins. Co.*, 22 N. D. 435, 133 N. W. 988; *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153.

Ohio. *Adams Exp. Co. v. St. John*, 17 Ohio St. 641; *Foote v. Central American Commercial Co.*, 26 Ohio Cir. Ct. 378; *Mohr & Mohr Distilling Co. v. Lamar Ins. Co.*, 7 Ohio Wkly. L. Bul. 342.

South Dakota. *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859.

Wisconsin. *Burgess v. C. Aultman & Co.*, 80 Wis. 292, 50 N. W. 175.

"The terms 'managing agent' indicate the character of the business the foreign corporation must be engaged in transacting in order to be liable for suit here. They clearly imply the carrying on of the corporate business, or some substantial part thereof, by means of an agent who manages and conducts the same, within the limits of the state for and on account of the foreign corporation. The business done must rise to the dignity and importance implied by the phrase 'managing agent' in order to come within the operation of the statute." *United*

States v. American Bell Tel. Co., 29 Fed. 17 (This definition of a managing agent is said, however, to have been obiter dictum. See *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919), holding that the licensees of a foreign telephone company, who are furnished by it with the means necessary to transact the telephone business in the state either upon a fixed rental and royalty on the telephone instruments used, or a percentage of the gross receipts of the business, are not its managing agents within the meaning of a statute providing that where a foreign corporation has a managing agent in the state, service of process may be made upon such agent.

An agent who is invested with the general conduct and control at a particular place, of the business of a corporation, is a managing agent within the meaning of a statute authorizing service of summons on a managing agent of a foreign corporation. *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153.

Where a foreign insurance corporation has appointed the insurance commissioner of the state its agent for the service of process in the state in actions against it, a financial agent of such company, whose duties are confined to soliciting loans, to be made by his principal, preparing the necessary notes and mortgages, and collecting the same, is not a "managing agent" of the foreign corporation within the meaning of such statute. *Bauer v. Union Cent. Life Ins. Co.*, 22 N. D. 435, 133 N. W. 988.

In a leading case, which is frequently quoted by the courts, the New York Court of Appeals, in considering a statute providing for service of process upon a "managing agent" of a foreign corporation within the state,

dealing in lumber and merchandise at a particular place within the

said: "Where the corporation has an office in this state, where a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a 'managing agent' in this state; and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business should be considered its managing agent; and more especially should that be so where the foreign corporation has an office or place of business in this state, and when the office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, 'a managing agent.'" *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360, aff'g 53 Hun 629, 5 N. Y. Supp. 493, and quoted with approval in *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77; *Brown v. Chicago, M. & St. P. Ry. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, and *Foster v. Charles Betcher Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 9.

See also *Ives v. Metropolitan Life Ins. Co.*, 78 Hun (N. Y.) 32, 28 N. Y. Supp. 1030; *Brayton v. New York, L. E. & W. R. Co.*, 72 Hun (N. Y.) 602, 25 N. Y. Supp. 264; *Barrett v. American Telephone & Telegraph Co.*, 56 Hun (N. Y.) 430, 10 N. Y. Supp. 138, aff'd 138 N. Y. 491, 34 N. E. 289; *Jackson v. Schuylkill Silk Mills*, 92 N. Y. Misc. 442, 156 N. Y. Supp. 219; *Russell v. Pittsburgh Life Insurance & Trust Co.*, 62 N. Y. Misc. 403, 115 N. Y. Supp. 950; *Palmer v. Pennsyl-*

vania Co., 2 How. Pr. N. S. (N. Y.) 156, aff'd 99 N. Y. 679.

Where the agent of the foreign corporation in the state was termed the "general sales manager" and, subject to the direction and control of the home office, managed the sales of the corporation in the state, hired and discharged its traveling salesmen and had general charge of its business affairs in this state, he was "a managing agent," within the meaning of a statute authorizing service of process upon a managing agent of the corporation within the state. That he was subject to the direction and control of the corporation is not material, for it is to be expected that even a managing agent shall be subject to direction and control by the executive officers of his principal. *Jackson v. Schuylkill Silk Mills*, 156 N. Y. Supp. 219, distinguishing *Beck v. North Packing & Provision Co.*, 159 N. Y. App. Div. 418, 144 N. Y. Supp. 602.

One who has no power to close contracts locally is not a managing agent within N. Y. Code Civ. Proc. § 432. *Franco-American Chemical Co. v. McKee Glass Co.*, 232 Fed. 198. In this case the court said: "Some doubtful cases occur when the agent has the power to close contracts. *Fontana v. Post Printing & Pub. Co.*, 87 App. Div. 234, 84 N. Y. Supp. 308, is such a case, and the court thought that even the power to close advertising contracts was not enough; to the same effect is *Vitolo v. Bee Publishing Co.*, 66 App. Div. 582, 73 N. Y. Supp. 273. *Palmer v. Chicago Evening Post*, 85 Hun 403, 32 N. Y. Supp. 992, must be considered overruled by these cases. In *Beck v. North Packing & Provision Co.*, 159 App. Div. 418, 144 N. Y. Supp. 602, *Snow* had no power to close contracts and the case was clearer, though there was a dissent. I can find

state, but who corresponds with, accounts to and receives instructions

no case holding that where the agent has no power to close a contract he has that superior position which the New York Code of Civil Procedure, § 432, means by 'managing agent,' as construed by the language used in *Taylor v. G. P. Ass'n*, 136 N. Y. 343, 32 N. E. 992, 32 Am. St. Rep. 749, and *Coler v. Pittsburgh Bridge Co.*, 146 N. Y. 281, 40 N. E. 779."

In *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308, the court held that a "managing agent" contemplated by the statute was one having "the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary."

In an action against a foreign corporation to compel the specific performance of a contract to sell certain bonds, service upon a person who was temporarily in the state at the time upon business connected with such bonds, and had stated that he represented the defendant, and whose name appeared in a city directory of a city of the state by which the corporation was created as "manager" of the defendant, was not a "managing agent" within the meaning of a statute providing for service of process upon any person holding some responsible and representative relation to the corporation such as the term "managing agent" would include. *Coler v. Pittsburgh Bridge Co.*, 146 N. Y. 281, 40 N. E. 779, rev'g 84 Hun (N. Y.) 285, 32 N. Y. Supp. 439.

A station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight and to collect for freight shipments, is sufficiently a managing agent to make service of summons upon him, in a civil action against the railroad company, service

upon such corporation. *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153. See also *Crawford v. Cunard S. S. Co.*, 8 Weekly N. Cas. (Pa.) 567; *National Bank of Republic v. New York Cent. & H. R. Co.*, 8 Wkly. N. Cas. (Pa.) 252.

A manager of an agency established in a state by a foreign railroad corporation for the purpose of soliciting traffic is a managing agent, within the meaning of a statute providing for service of process upon the managing agent of a foreign corporation. *Fremont, E. & M. Val. R. Co. v. New York, C. & St. L. R. Co.*, 66 Neb. 159, 59 L. R. A. 939, 92 N. W. 131. See also *Mausser v. Union Pac. R. Co.*, 243 Fed. 274. Compare, however, *Joseph v. Kansas City, M. & O. R. Co. of Texas*, 180 N. Y. App. Div. 313, 167 N. Y. Supp. 273.

In *Baltimore & O. R. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 117, service was had upon a local agent of the foreign corporation defendant, whose duties consisted in contracting for the transportation of freight and attending to the transfer of freight to and from connecting railroads on through bills of lading. This service was held to be good.

In *American Exp. Co. v. Johnson*, 17 Ohio St. 641, the foreign corporation defendant, at the time of service, had a general superintendent for the state and two or more local agents in one of the counties, one of whom resided in said county and kept an office there at which he received and forwarded packages for the company and transacted all the business usually transacted in such receiving and forwarding offices. This service was held good, and that the agent was a "managing agent." See, however, *Joseph v. Kansas City, M. & O. Ry. Co. of*

from, the main office of such foreign corporation in the foreign state,

Texas, 181 N. Y. App. Div. 313, 167 N. Y. Supp. 273.

In *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919, where the foreign corporation defendant was served by delivering the summons to the person who chiefly represented it as agent for the sale of goods in a given subdivision of the state, and who maintained an office or storeroom where goods were kept, but who was paid a commission only on sales as compensation for his services, this service was held to be good, and that such an agent was a "managing agent," within the meaning of this section. District Judge Thompson, in passing on the motion below had distinguished the language used in *United States v. American Bell Tel. Co.*, 29 Fed. 17, indicating that a "managing agent" meant a person who had either general or controlling authority of some substantial part of the corporate business, and that "doing business within the state" meant a continuous and extensive series of transactions. Judge Thompson, however, points out that Judge Jackson did not cite the two cases from the Supreme Court of Ohio above noted. (*American Exp. Co. v. Johnson*, 17 Ohio St. 641; *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 117), and that all of its observations were obiter. Judge Severens, delivering the opinion, cites the Ohio Supreme Court cases, quotes with approval Judge Thompson's criticism, and further says: "The Ohio Supreme Court evidently intended to give a liberal interpretation to the statute to facilitate the obtaining of jurisdiction over foreign corporations doing business in the state, and held that one who chiefly represented the corporation in a locality where it was doing business was its managing agent there.

And indeed a construction of this statute which restricted the meaning to one who was a general manager would very much limit its utility. As was said by Mr. Justice Gray in *Barrow . . . Steamship Co. v. Kane*, 170 U. S. 100, 106: "The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

Under a statute providing that if the suit is against a foreign corporation, doing business and having a managing or business agent, cashier, or secretary within the state, summons must be served by delivering a copy thereof, to such agent, cashier or secretary, it is held that a foreign railroad corporation which does not own or operate any railroad in the state, but has an office therein upon which is a sign indicating that it is the freight and passenger office of the corporation, and a managing agent in charge of that office, for the purpose of soliciting business in transporting freight and passengers over its road situated in the state of its domicile, who issues a shipping receipt or bill of lading for goods to be shipped over its line of railroad, is liable to suit in the state, and service of process against him is sufficient service upon the corporation. *Mauser v. Union Pac. R. Co.*, 243 Fed. 274; *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77. See also *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360, aff'g 53 Hun 629, 5 N. Y. Supp. 493; *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 369, aff'd 99 N. Y. 679.

Where the statute provided for service upon the "managing" agent of a foreign corporation, in an action against a foreign corporation, service

receives and disburses moneys, pays freight, makes contracts with customers as to terms of payment of accounts, issues receipts for money, employs all necessary temporary assistance for and in behalf of the

was held to be sufficient where it was made upon an agent engaged in behalf of the corporation in repairing an electric light and street car plant who was also superintendent of construction and had oversight of the entire work. *Clinard v. White*, 129 N. C. 250, 39 S. E. 960.

In an action against a nonresident corporation, summons may be served on its managing agent in the erection of a building in the county where the suit is brought, and the fact that such managing agent had been ordered to go to another state to erect a building for the corporation, when the summons was served, does not render the service void or deprive the court of jurisdiction. *King Lumber Co. v. Omaha Steel Const. Co.*, 98 Neb. 542, 153 N. W. 563.

Where a foreign corporation has never done any business in the state except one piece of construction work, and no one has ever carried on any business in the state for it except one employee who did all the business in connection with such work, service of process may be made upon him as a "managing agent" of the corporation. *First Nat. Bank v. General Const. Co.*, 180 N. Y. App. Div. 750, 168 N. Y. Supp. 303.

In considering such a statute it is said: "The term 'business agent,' as used in the statute, does not mean every man who is intrusted with a commission or an employment by a foreign corporation. It does not mean every man who does any kind of business for a corporation. It may be said that every employee of a railroad corporation is in a certain sense an agent of the corporation. But it would be absurd to say that a brakeman employed by a corporation was a business

agent upon whom service could be made, because he performed some business for the corporation, or that an expressman regularly employed by a manufacturing corporation to deliver machinery to its customers is an agent upon whom service could be made under the provisions of the statute. The statute was never intended to include under the term 'business agent' every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business, which may be, and is, conducted and carried on by the corporation within the state where the service is made,—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for the corporation. To constitute a managing or business agent upon whom service of process could be made, the agent must be one having in fact a representative capacity and derivative authority, and not one created by construction or implication, contrary to the intention of the parties." *Doe v. Springfield Boiler & Manufacturing Co.*, 104 Fed. 684, quoted with approval in *Jameson v. Simonds Saw Co.*, 2 Cal. App. 582, 84 Pac. 289.

For distinction between "managing agent" and "business agent," see *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338.

corporation, and, with the knowledge and under the instructions of the corporation, holds himself out and advertises in the newspaper as manager, is the "managing agent" of such foreign corporation within the meaning of a statute providing that service of process can be made in respect to a foreign corporation on the managing agent thereof.⁶⁴ An attorney at law representing a foreign corporation in a suit to foreclose a mortgage held by it is not a managing agent within the meaning of a statute providing that service of process may be made upon a managing agent of the corporation within the state, and service of process upon him confers no jurisdiction over the corporation.⁶⁵ Under a statute providing that when the defendant is a foreign corporation, having a managing agent in the state, the service may be upon such agent, it is held that the person who chiefly represents a foreign corporation in a certain portion of the state, and who provides an office or storeroom where the products of its manufacture are kept and business is transacted by the salesmen of the corporation in such portion of the state, all such products for that territory being consigned to him and he being responsible for them and the prices received for them whether actually sold by him or his assistants, is a managing agent within the meaning of such statute, even if he receives as his compensation for his services not a salary, but a commission on the sales made in such territory.⁶⁶

There are, however, cases holding that a managing agent is one who has full and complete authority in all branches of the corporation's business. For instance, in Wisconsin the following appears

⁶⁴ *Foster v. Charles Betcher Lumber Co.*, 5 S. D. 57, 23 L. R. A. 490, 49 Am. St. Rep. 859, 58 N. W. 2, quoting with approval *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360.

⁶⁵ *Taylor v. Granite State Provident Ass'n*, 136 N. Y. 343, 32 Am. St. Rep. 749, 32 N. E. 992.

Under a statute providing that in an action against a foreign corporation the summons may be served upon the defendant's chief officer or agent who may be found in the state, and that "the chief officer of a corporation which has any officers or agents is (1) its president; (2) its vice president; (3) its secretary; (4) its cashier or treasurer; (5) its clerk; (6) its managing agent," it was held that

where a foreign corporation had ceased to do business in the state, and the only business it was conducting therein was the winding up of certain matters which grew out of a lease of a railroad made by it, and this was such as necessarily required the attention of a professional lawyer, and the only agent which the corporation had in the state was its general counsel, who was looking after such business, service of process might be made upon him in an action against the corporation, as he was "the managing agent" within the meaning of such statute. *Newport News & M. Val. Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332.

⁶⁶ *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919.

to be the rule: "The managing agent of a corporation is an agent having a general supervision over the affairs of the corporation, and must be an officer of the corporation; and hence a person who is only managing agent in a county, state, or other defined district is not a 'managing agent of a corporation,' having supervision over all its affairs, since the term implies a general supervision of the affairs of the corporation in all its departments, perhaps to a greater extent than is implied by any other single officer, so called, as a president, cashier, secretary, or treasurer. It is usually understood to designate the person who has the most general control over the affairs of the corporation, and who has knowledge of all its business and property, and who can act in emergencies on his own responsibility." ⁶⁷ A salaried agent of a foreign newspaper corporation who

⁶⁷ *Wheeler & Wilson Mfg. Co. v. Lawson*, 57 Wis. 400, 15 N. W. 398; *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290; *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220. See *Ord Hardware Co. v. J. I. Case Threshing Mach. Co.*, 77 Neb. 847, 8 L. R. A. (N. S.) 770, 110 N. W. 551, considering the two views as to what constitutes a managing agent and extensively reviewing the authorities.

As used in the Oklahoma statute (*Wils. Stat.* 1903, § 4274), the term "managing agent" means an agent whose agency extends to all the transactions of the corporation within the state, one who has or is engaged in the management of the business of the corporation, in distinction from the management of a local or particular branch or department of the business. *Waters Pierce Oil Co. v. Foster*, 52 Okla. 412, 153 Pac. 169.

In a New York case, the court said: "The managing agent upon which the summons may be served must be one whose agency extends to all the transactions of the corporation; one who has or is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business." *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. (N. Y.) 183. This language was

referred to and criticized in a federal court where the court said: "The language quoted is much broader than that used in the subsequent cases, and was not necessary to the decision of the case; since it appeared that the alleged agent was employed with very limited powers, in connection with a very small part of the defendant's business. * * * The adjudications in the state courts have not gone so far as to hold that no agent is a 'managing agent' who does not participate in the management and control of every part of the corporate business, and of every corporate act. Still less has such a construction of these words been given in any local action like this, where that construction would defeat justice and enable a corporation systematically to violate the law with impunity. Such a construction, it seems to me, would be unreasonable, and presumably foreign to the intent of the statute, where the words 'managing agent' are equally capable of including a care of the management and control of that department of the company's business out of which the wrongs proceed." *Hat-Sweat Mfg. Co. v. Davis Sew-Mach. Co.*, 31 Fed. 294.

A sales agent is not a "managing agent" within the meaning of N. Y.

is employed to obtain advertisements in the state for a newspaper of such corporation published in the state of its domicile, authorized to make conclusive contracts in regard to advertisements and receive pay therefor, and who is in charge of an office in the state which carries on its door or window the name of the corporation's newspaper is not a "managing agent" upon whom process against the corporation may be served under a statute providing that service of process against a foreign corporation can be effected by service upon a resident managing agent where the cause of action arose within the state.⁶⁸

Under a statute requiring service of process on a foreign corporation to be made on its managing agent and which provides the only mode of obtaining service, other than an agent appointed to accept service of summons, a return showing service of summons upon the secretary and treasurer of a defendant foreign corporation should be quashed, as he is not necessarily the person having the management of its business in the state.⁶⁹

§ 6036. Service upon presidents. Where a foreign corporation is doing business in the state, service of process upon its president who is in the state on business of the corporation is sufficient to give the court jurisdiction in an action against the corporation.⁷⁰

Code Civ. Proc. § 432, subd. 3, providing for service of process upon the managing agent of a foreign corporation under certain conditions. *American Oil & Supply Co. v. Western Gas Const. Co.*, 239 Fed. 505. See *R. M. Owen & Co. v. Johnson*, 184 Ill. App. 90, holding that service on sales agent of foreign automobile company good under *J. & A.* 1913, ¶ 8445.

⁶⁸ *Union Associated Press v. Times-Star Co.*, 84 Fed. 419, disapproving *Bröwer v. George Knapp & Co.*, 82 Fed. 694, and *Fontana v. Chronicle-Tel. Co.*, 83 Fed. 824. See also *Doherty v. Evening Journal Ass'n*, 98 N. Y. App. Div. 136, 90 N. Y. Supp. 671; *Fontana v. Post Ptg. & Pub. Co.*, 87 N. Y. App. Div. 233, 84 N. Y. Supp. 308; *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273.

⁶⁹ *McCullough v. United Grocers' Corporation*, 247 Fed. 880.

"In the case of *Coler v. Pittsburgh*

Bridge Co., 146 N. Y. 281, 40 N. E. 779, and in the case of *Vitolo v. Bee Pub. Co.*, 66 N. Y. App. Div. 582, 73 N. Y. Supp. 273, it was expressly held: 'That proof which shows only that the claimed managing agent is a representative of the defendant for some purpose is not sufficient upon which to predicate the fact that he is a managing agent within the meaning of the section of the Code authorizing service to be made upon him.' " *Lehman, J.*, in *Dimond-Warren Motor Co. v. Herff-Brooks Corporation* (N. Y. Misc.), 158 N. Y. Supp. 1.

⁷⁰ *Lively v. Picton*, 218 Fed. 401; *Bagdon v. Philadelphia & R. Coal & Iron Co.*, 217 N. Y. 432, L. R. A. 1916 F 407, Ann. Cas. 1918 A 389, 111 N. E. 1075, rev'g 170 N. Y. App. Div. 504, 156 N. Y. Supp. 647; *Spokane Merchants' Ass'n v. Cleve Clothing Co.*, 84 Wash. 616, 147 Pac. 414.

Where the president of a foreign

Where there are no special statutory provisions for the service of process upon foreign corporations, service of process in the state upon the president of a foreign corporation doing business in the state is *prima facie* sufficient to confer jurisdiction upon the court over the corporation although it does not show that at the time of the service he was an agent to represent the corporation in the state, if service upon the president would be good against a domestic corporation.⁷¹

Service of process upon the president of a foreign corporation is ineffectual to bind it unless he is in the state officially representing it in its business.⁷² Thus in a personal action against a corporation

corporation is a resident of the state and has an office therein where he performs his duties as president of such corporation, other than such duties as take him without the state, and has continuously so acted and done for some years past, service of process upon him within the state in an action against the corporation by a resident of the state on a cause of action arising without the state, is sufficient to give the court jurisdiction of the defendant foreign corporation. *Revens v. Southern Missouri & A. R. Co.*, 114 Fed. 982.

Under § 432, subd. 1, N. Y. Code Civ. Proc., service of process in an action against a foreign corporation may be made upon the president, even though the corporation has not designated a person upon whom process may be served, as provided by subd. 2 of such section. *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191.

See *Mallory v. Virginia Hot Springs Co.*, 157 N. Y. App. Div. 253, 141 N. Y. Supp. 961, holding service of process upon the president within state gives jurisdiction of foreign corporation.

⁷¹ *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 49 Pac. 876. The court said: "If a foreign corporation is not doing business here, service upon its president or other officer will, of course, not give the courts of the state

jurisdiction of the corporation, because it does not accompany such officers into the state; but where the corporation itself has come into the state, and engaged in the transaction of its ordinary corporate business, service upon its president in the county where the cause of action arose is at least *prima facie* sufficient."

⁷² *Bagdon v. Philadelphia & R. Coal & Iron Co.*, 217 N. Y. 432, L. R. A. 1916 F 407, Ann. Cas. 1918 A 389, 111 N. E. 1075, rev'g 170 N. Y. App. Div. 594, 156 N. Y. Supp. 647.

In considering the effect of service upon the president of a foreign corporation who was served with process in an action against it, and who was in the state on his own business and not on that of the corporation which had never done any business in the state, the Supreme Court of North Carolina, in *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447, said: "The president of the defendant company was found in this state, and the summons was personally served upon him. Our law was complied with. Why is not the service good? The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. The legislative power of the state in which the

which is neither incorporated nor does business within the state, nor

action is commenced is charged with the duty and responsibility of prescribing the rules governing in such matters, and its action is not reviewable unless it should plainly appear that the notice did not amount to 'due process of law.' Such a manner of service of summons as our legislative body has provided may not be the best that might have been desired, but it is clear as to its meaning, not unreasonable, and there is nothing for the court to do but uphold it. It is a most reasonable presumption that the officer served with the process in this case would communicate the notice to the corporation at once. It was his duty to take notice of the commencement of the action, and to give the information to the defendant. We do not see how the fact that the officer who was served with process was in the state on his private business at the time of the service can render the service invalid. Neither can the fact that he was not actually engaged in the service of the corporation at the time have such effect. In the case of service on an officer of a domestic corporation it could not be supposed that it was necessary to serve it on him while he was actually engaged in the corporation's business, or acting officially for it. The just and legal foundation for such service rests in the duty of the officer to report such service, and that the corporation would by that means receive notice. A judgment obtained in an action thus commenced against a foreign corporation would be valid in this state, and enforceable against any property at any time found in this state. What effect it would have in another state we need not discuss. The law of New York upon the question of service of process on foreign corporations is like ours, except that

a nonresident, either individual or corporation, cannot bring a suit against a foreign corporation. In that state the question now before us, on a similar state of facts, has been before their Court of Appeals, and the service was held to be valid. *Pope v. Manufacturing Co.*, 87 N. Y. 137. The court there said: 'In order to make such service effective, it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation, or that the corporation should have any property in the state, or that the cause of action should have arisen in the state.' The Court of Errors and Appeals of New Jersey, in the case of *Moulin v. Insurance Co.*, 24 N. J. Law 222—a case in which a judgment creditor commenced an action in that state upon a judgment obtained in the state of New York—the defendant having been a foreign corporation, without property in the state, the cause of action not having arisen in the state, the corporation having no business in the state, and the president being accidentally in the state on a visit when the summons was served on him, refused to recognize the validity of the judgment. There was no statutory law, however, in New Jersey as existed in New York in reference to the service of process on foreign corporations."

It is held in Louisiana that any service of citation which would be sufficient as against a domestic corporation under the laws of the state will be sufficient as against a foreign corporation, if so provided by statute, and that, accordingly, service made upon the president of a foreign corporation during the time he may be temporarily abiding within the jurisdiction where the suit is brought, is sufficient to bring such corporation into court,

has any agent or property therein, service of the summons upon its president, temporarily in its jurisdiction, is not sufficient service upon the corporation.⁷³ And where a judgment was obtained against a foreign corporation, without property in the state, the cause of action not having arisen in the state, the corporation having no business therein, and the president being accidentally in the state on a visit when the summons was served on him in pursuance of such a statute, it was held in New Jersey that the validity of the judgment would not be recognized.⁷⁴

§ 6037. Service upon vice president. Where the statute, in specifying how service of process shall be made upon a foreign corporation, names no official, but specifies that such service may be made upon any agent, it is held that service of process made upon the vice president and the return so stating are sufficient to confer jurisdiction upon the court, and the return need not state that service was had upon the vice president as agent of the corporation.⁷⁵ Under a statute pro-

and a judgment rendered in an action thus commenced against a foreign corporation is enforceable against any property that may be found at any time belonging to such corporation. *Payne & Joubert v. East Union Lumber Co.*, 109 La. 706, 33 So. 739; *Gravelly v. Southern Ice Mach. Co.*, 47 La. Ann. 389, 16 So. 866.

⁷³ *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, aff'g 110 Fed. 730; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517. See §§ 6041-6043, *infra*.

⁷⁴ *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222.

In *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, Mr. Justice Gray said: "This writ of error presents the question whether, in a personal action against a corporation, which is neither incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction is sufficient service upon the corporation. * * * It is an elementary principle of jurisprudence that a court of justice cannot ac-

quire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. (Citing authorities.) * * * So the judgment rendered in the court of one state against a corporation neither incorporated nor doing business within the state must be regarded as of no validity in the courts of another state or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state and not charged with any business of the corporation there." See also *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442.

⁷⁵ *Venner v. Denver Union Water*

viding that if suit be brought against a corporation, service shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof, but if no such officer of the corporation can be found in the county, service may be made on any stockholder of such corporation, it is held that service upon the vice president is sufficient to confer jurisdiction of the corporation, and the certificate of return on the summons need not state that the president could not be found in the county, though in case of service upon a stockholder, before a judgment of default could be entered, the return should show that none of the officers enumerated was within the county where service was had.⁷⁶ It is held by a federal court that service of process upon the vice president and general manager of a foreign corporation doing business in the state is sufficient to confer jurisdiction over the corporation, if he is within the district on business of the corporation at the time the service is made.⁷⁷

Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, 627. The court said: "As a general proposition it is true that in an action against a corporation the return of the summons must affirmatively show that service was made upon an officer or agent of the corporation as specified in the statute as one upon whom service may be made. Our Code, in specifying how service of process shall be made upon a foreign corporation, names no official, but specifies that such service may be made upon any agent. The purpose was to employ a term so broad as to cover all who bore the relation of agent to such corporations, without specifically naming the official who should be regarded as an agent. The general assembly had the power to make a provision as broad and sweeping as this, provided, of course, that service of process shall be upon such agents as may be properly deemed representatives of the corporation. In the case at bar the service was upon the president or vice president, and the returns so state. The person sustaining either of these relations to a corporation is an acknowledged officer thereof. It

would be difficult to define, with any degree of certainty, what the ordinary duties of a vice president may be. Generally he acts as president in the absence of the latter from duty, exercising such authority with respect to the affairs of the corporation as the president might himself, were he present. Certainly he is an agent of the corporation of which he is vice president, and so is the president, and it is not necessary that the officer serving the process should specify in his return that he had served either of these officials in the capacity of agent, when it appears that service was upon a specified official of the corporation, which carries with it the information by implication that service was upon an agent thereof."

⁷⁶ Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061. See, however, Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

⁷⁷ Twin Lakes Land & Water Co. v. Dohner, 242 Fed. 399.

§ 6038. Service upon a director of foreign corporation. By some of the statutes relating to service of process upon foreign corporations it is provided that service may be made upon a director of the corporation within the state.⁷⁸ It is requisite to the validity of such service that the foreign corporation be engaged in business within the state.⁷⁹ Service of process within the state upon resident directors of a foreign corporation which, though it had formerly done business in the state, had ceased to do so at the time of such service of process, and had designated no agent in the state upon whom process might be served as required by statute, was held not sufficient to confer jurisdiction upon the federal courts over such foreign corporation.⁸⁰

78 United States. *St. Louis Southwestern R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915 B 77; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96; *Martin v. New Trinidad Lake Asphalt Co.*, 130 Fed. 394; *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349; *Meyer v. Pennsylvania Lumbermen's Mut. Fire Ins. Co.*, 108 Fed. 169; *Devere v. Delaware, L. & W. R. Co.*, 60 Fed. 886; *Bentlif v. London & Colonial Finance Corporation*, 44 Fed. 667. See *Takacs v. Philadelphia & R. Ry. Co.*, 228 Fed. 728.

Missouri. *Latimer v. Union Pac. Ry.*, 43 Mo. 105, 97 Am. Dec. 378.

New Jersey. *Doctor v. Desmond*, 80 N. J. Eq. 77, 82 Atl. 522.

New York. *Childs v. Harris Mfg. Co.*, 104 N. Y. 477, 11 N. E. 50; *Norkus v. Pittsburgh Coal Co.*, 169 App. Div. 919, 153 N. Y. Supp. 935; *Donohue v. City Water Power Co.*, 159 App. Div. 776, 144 N. Y. Supp. 923; *Scherer v. Ground Hog Mining & Milling Co.*, 28 Civ. Proc. 231, 55 N. Y. Supp. 743, 1148.

North Carolina. *Menefee v. Riverside & Dan River Cotton Mills*, 161

N. C. 164, 76 S. E. 741, rev'd 237 U. S. 189, 59 L. Ed. 910; *Clinard v. White*, 129 N. C. 250, 39 S. E. 960.

See §§ 2992, 2993, *supra*.

79 Toledo Railways & Light Co. v. Hill, 244 U. S. 49, 61 L. Ed. 982; *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. Ed. 910, rev'g 161 N. C. 164, 76 S. E. 741; *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Doctor v. Desmond*, 80 N. J. Eq. 77, 82 Atl. 522.

"By section 432, subd. 3, of the Code of Civil Procedure, service is authorized upon a resident director, where the defendant, a foreign corporation, has property within this state. The service upon the defendant in this manner is therefore authorized by the Code, and for that reason the motion to set aside the service of the summons was properly denied." *Norkus v. Pittsburgh Coal Co.*, 169 N. Y. App. Div. 919, 153 N. Y. Supp. 935. See also *Donohue v. City Water Power Co.*, 159 N. Y. App. Div. 776, 144 N. Y. Supp. 923.

80 Toledo Railways & Light Co. v. Hill, 244 U. S. 49, 61 L. Ed. 982; *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 49 L. Ed. 1133; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, aff'g 110 Fed. 730; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed.

Under a statute authorizing an action to be commenced against a foreign corporation which neither does business nor has a place of business or property within the state by the service of summons upon a director who may be found in the state, although when he is found in the state he is not there in any official capacity or in the business of the corporation, it is held that the court acquired by such service no jurisdiction to render a personal judgment against the corporation.⁸¹

Where a foreign corporation is doing business in the state and the cause of action against it arose therein, service of process in such action made within the state upon a director permanently residing

222. See also *Takacs v. Philadelphia & R. Ry. Co.*, 228 Fed. 728; *Martin v. New Trinidad Lake Asphalt Co.*, 130 Fed. 394.

It is also held under such statute that the plaintiff exercised due diligence to obtain service of process upon the officers of a foreign corporation, so as to warrant service of process on a director of such corporation where plaintiff called at the office of the secretary and was informed by the clerk in charge of such office that no officers of the corporation were within the state upon whom process could be served, and was given by the clerk the names of several directors who could be found in the state, upon whom such process could be served. *Honeyman v. Colorado Fuel & Iron Co.*, 133 Fed. 96.

⁸¹ *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Bentlif v. London & Colonial Finance Corporation, Ltd.*, 44 Fed. 667; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635.

In *Bentlif v. London & Colonial Finance Corporation, Ltd.*, 44 Fed. 667, the court said: "The Code of Civil Procedure of this state (section 432, subd. 3), as construed by the highest court of the state, authorizes an action to be commenced against a foreign corporation if the cause of action arose here, which neither does business nor has a place of business or property

within the state, by the service of a summons upon a director who may be found here, although when found not here in any official capacity or in the business of the corporation. *Hiller v. Railroad Co.*, 70 N. Y. 223; *Pope v. Manufacturing Co.*, 87 N. Y. 137. The question of the jurisdiction of the state court in the present case depends upon the efficacy of such a service of process. For the reasons stated in the judgment of this court in *Goodhope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635, a personal judgment obtained in a suit commenced by such a service only, the defendant not appearing, would not be enforced in this court. If the suit had been commenced by the attachment of property of the defendant found here a different case would be presented; but if the action in the state court had proceeded to judgment, and the property belonging to the defendant and found here had been seized and sold on execution issued from the judgment, the defendant could have resorted to this court to recover its value upon the theory that the judgment was a nullity. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354; *Pennoyer v. Neff*, 95 U. S. 714. Upon the authority of these cases it seems entirely clear that the state court never acquired jurisdiction to adjudicate the action."

in the state is sufficient.⁸² In an action against a foreign insurance company upon a policy of insurance issued by it, service upon a resident director of the state where service was made was held to be sufficient to confer jurisdiction upon the court, where such corporation was doing business within the state.⁸³

It is held, however, by a federal court that service of process upon a mere director who is found within the district, but who neither transacts any corporate business nor is charged with any business of the corporation, is not under the general law sufficient service upon the corporation.⁸⁴ Service of process upon a director of a foreign corporation who has come into the state for the purpose of voting as proxy, at a meeting of the stockholders of a domestic corporation held within the state, stock in such corporation owned by the foreign corporation, is not sufficient to confer jurisdiction over the foreign corporation.⁸⁵

Where by statute service of process on a director is permissible,

⁸² *Meyer v. Pennsylvania Lumberman's Mut. Fire Ins. Co.*, 108 Fed. 169.

"While service upon a stockholder or even upon a director of the defendant resident within the commonwealth, in accordance with R. L. c. 167, § 36, standing alone, might be disregarded if the corporation transacted no business within the state (*Riverside Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910), when it is found that the corporation is transacting business within the commonwealth, then such a service made in accordance with a statute offends no constitutional provision and constitutes adequate service of process (*Pennsylvania Lumberman's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486)." *Reynolds v. Missouri, K. & T. R. Co.*, 224 Mass. 379, 113 N. E. 413.

⁸³ *Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. Ed. 810, cited with approval in *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 49 L. Ed. 1133. See § 6039, *infra*.

⁸⁴ *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349. See also *Craig v. Welch Motor Car Co.*, 165 Fed. 554.

Under a statute providing that personal service of summons upon a foreign corporation may be made (1) upon the president, treasurer or secretary, (2) on a person designated for the purpose by the corporation, (3) in the absence of the above "on the cashier, director or managing agent within the state," provided that the corporation has property within the state, or the cause of action arose therein, it was held that service of process in an admiralty suit for breach of contract made in the state may be made upon a director of a foreign corporation found within the district where the foreign corporation owned a leasehold interest in a number of vessels within the state, and that in transacting the business of hiring a vessel from the libellant within the district the corporation assents to service of process in accordance with the state laws. *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349.

⁸⁵ *Doctor v. Desmond*, 80 N. J. Eq. 77, 82 Atl. 522.

it is held that the evidence showing that the person served was a director by election and the records of the corporation declaring that he was a director were sufficient to warrant the court in finding that he was a director in fact, and that service of process upon him was sufficient to bind the corporation.⁸⁶

§ 6039. Service upon a stockholder of a foreign corporation. In some of the states it is provided that service of process under certain circumstances may be made upon a resident stockholder of the foreign corporation.⁸⁷

Where substituted service of process is authorized, it is sufficient to give the court jurisdiction only where the condition upon which it is permissible exists, and the existence of the condition is not to be inferred, but must appear by affirmative statement in the return.⁸⁸ So under a statute providing that if a suit is brought against a foreign corporation, service shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof, but if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation, it is held that if service be made upon a stockholder, the return should show that none of the officers above enumerated was within the county where the service was had, as there can be no service upon a stockholder except upon a failure to find an agent in the county.⁸⁹ Consequently where the return merely shows service of the summons upon the stockholder and says nothing about an agent and does not purport or pretend to show the existence of the condition upon which alone service on the stockholder is authorized by such statute, and there was no appearance to the action by the corporation, it is not within the jurisdiction of the court, and judgment against it was, as to it, a nullity.⁹⁰

⁸⁶ Childs v. Harris Mfg. Co., 104 N. Y. 477, 11 N. E. 50.

⁸⁷ Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623; Colorado Iron-Works v. Sierra Grande Min. Co., 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

⁸⁸ Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

⁸⁹ Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

⁹⁰ Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

The question whether the person upon whom service is made, was or was not, at the time of such service, a stockholder in the foreign corporation is sometimes not one easy of solution. Illustrative of this is Colorado Iron-Works v. Sierra Grande Min. Co.,

§ 6040. Service on local agent. By the statutes of some of the states it is provided that in an action against a foreign corporation service of process may be made upon its local agent within the state.⁹¹ Where a service of process is permitted by statute upon a local agent, service must be made upon an agent upon whom it may fairly be presumed the duty rests, by virtue of his official position or his employment, to communicate the fact of service to his principal.⁹²

The term "local agent," as used in a statute providing that citation or other process may be served upon a foreign corporation by service upon "the president, secretary or treasurer, or general manager, or upon any local agent within this state," implies a representative of the corporation appointed to transact its business and represent it in the particular locality, and it does not include an agent who casually happens to be in the particular territory, or one who is temporarily sent to such locality to perform some particular purpose or specific act. It is a statutory term, and implies that the corporation is doing business in the state and is represented in that business by an agent who at the time is located within the state.⁹³ Under such a statute it is held that the phrase "any local agent" means an agent within a given place, or within a definite district, and that "an agent for the state" is not a local agent, and consequently service upon a state agent was not authorized by law.⁹⁴ Under a statute providing that service of process in an action against a foreign corporation may be made upon its local agent, and containing a proviso "that any person receiving or collecting moneys within this state for or on behalf of any corporation of this or any other state or government shall be deemed a local agent," it was held that it was not the intention of the legislature to limit service to such class of agents, but to extend the meaning of the word "agent" to embrace them, and that the authority to receive money, of itself, constitutes the one so authorized a local agent, but this is not the exclusive test of agency.⁹⁵ The local operator of a foreign wireless telegraph corporation, who is in sole charge of its property at that point, and in control of its business,

15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325.

⁹¹ See § 2996, *supra*, as to service on local agents of corporations generally.

⁹² *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

⁹³ *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608. See also *Latham Co. v. J. M. Radford Grocery*

Co., 54 Tex. Civ. App. 510, 117 S. W. 909.

⁹⁴ *Western Cottage Piano & Organ Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516.

⁹⁵ *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913; *Copland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501.

and has received messages from ships at sea, though the office was not open for general business, is its "local agent."⁹⁶ So, also, is the book-keeper of a foreign corporation which is engaged in building a bridge within the state, where he is apparently the only financial agent within the state who is connected with the construction of a bridge within the state.⁹⁷ A traveling auditor of a foreign corporation which had ceased to do any business in the state, who never received, or was authorized to collect or receive, money for the corporation, is not, however, a local agent.⁹⁸ Nor is one employed as a watchman to guard the premises of a foreign corporation.⁹⁹ Under a statute providing that a foreign corporation may be sued in any county in the state where it has an agency or representative, and another statute providing that process in an action against a foreign corporation may be served upon its local agent, it is held that by the term "local agent" is meant a person who is representing the corporation in the promotion of the business for which it was incorporated, and that an attorney at law employed to adjust its claims, or, for that matter, an attorney employed to go to any part of the state to represent it in the settlement of claims, was not such a local agent within the meaning of the statute, as could be served with process in any county in which he might be at the time of service.¹

⁹⁶ *Copland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501.

⁹⁷ *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913.

⁹⁸ *Sherwood Higgs & Co. v. Sperry & Hutchinson Co.*, 139 N. C. 299, 51 S. E. 1020. The court said: "It is said that, if the service be upon any person connected with the corporation who would probably apprise the managing officers of such service, it is sufficient. This suggestion would appeal to the legislature in providing for service on corporations, but cannot justify us in straining the language of the statute beyond its natural and proper meaning. It is sometimes difficult to define the terms 'managing or local agent' as applied to corporations; but in this case it is not claimed that Anthony was a managing agent, and the finding of the judge excludes the idea that he received or collected

money. It is true that he presented an account to the plaintiffs, and requested payment to himself; but he received no money, and says that he presented the account without authority, and his honor so finds."

⁹⁹ *Kelly v. Lefaiver & Co.*, 144 N. C. 4, 56 S. E. 510.

¹ *Bay City Iron Works v. Reeves & Co.*, 43 Tex. Civ. App. 254, 95 S. W. 739. The court said: "The law evidently contemplates service on a person employed in forwarding the particular line of business for which the corporation was organized, and not every person who may be employed in any capacity by it. Under the theory of appellant a corporation, foreign or domestic, that is engaged in the sale of merchandise, could be sued in any county of the state into which its agents might travel to solicit patronage, and service could be obtained on the corporation by service on the

The agent served must be a local agent within the state, and this must affirmatively appear before judgment by default would be proper, and where the citation directed the officers to summon the defendant foreign corporation by delivering to a certain person, "agent," and the return recited delivery to such person, agent, in person, and the petition alleged that such person was the agent of the defendant in the state and resided at a specified city therein, it was held that it did not affirmatively appear that he was a local agent, and a judgment by default on such service against the defendant should not have been granted.²

agent, or 'drummer.' By 'agency' or 'representative' is meant a fixed or permanent agency in the county in which the suit is instituted and by the term 'local agent' is meant one who serves his principal in a certain fixed locality.³

See also *Moore & Falk v. Freeman's Nat. Bank*, 92 N. C. 590.

² *National Cereal Co. v. Earnest* (Tex. Civ. App.), 87 S. W. 734.

Under such a statute it is held that it is not essential, though perhaps the better practice in suits against foreign corporations, for the petition and citation to state the local agent or general manager of the defendant upon whom service is to be made, but an omission to do so invalidates neither the petition nor the citation. When the name is thus stated a judgment by default may be taken without proof that the person to whom the citation was delivered was in fact the agent of the corporation. If the name, however, is not so stated, it seems that judgment by default should not be taken until proof is made of the agency of the person served, and that while it is a general rule that the return on a citation, made by an officer competent to serve the writ, of the fact and mode of service, if in due form, is ordinarily conclusive upon the parties to the record, yet it seems that in Texas, in a suit against a corpora-

tion, when its local agent or other officer upon whom service may be had is not named in the citation, the sheriff's return showing service upon such agent or officer is not conclusive of the fact that he was such agent or officer, but such fact may be put in issue, and that, if judgment by default has been taken against a corporation, it can either by motion or original suit have the judgment set aside by proving that the person cited was not its agent or officer upon whom service can be had. *El Paso & S. W. Ry. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, approved on this point, but reversed on other grounds in 99 Tex. 87, 87 S. W. 660. The court, in holding that where service is made upon the general manager of a foreign corporation it can make no difference whether he is the local agent of the corporation or not, said: "The general rule is that service of process, to be binding upon a corporation, must be made upon the identical officer or agent, or on one of the officers or agents, prescribed by the statute. *Clark & M. Corp.* § 267. As an agent is one who is employed and authorized to represent and act for his principal, it is difficult to conceive of a 'local resident agent' of a corporation who is not 'representing' the company. If he is 'representing' it, he must necessarily represent it in the county where he is the

§ 6041. Service on officer casually or temporarily in state. It is settled by numerous decisions that if a foreign corporation is not doing any business in the state, service of process upon an officer or agent who happens to come into the state, whether on his own business or casually on business for the corporation, is not service upon the corporation, and can give no jurisdiction as against it, for the officer or agent does not represent the corporation in such a case.³

local resident agent of such corporation. The statute does not designate the kind of local agent, and, as there may be any number of local agents representing a railway corporation in a county where it is sued, it would seem that citation in suits against the corporation might, within the language of the statute, be served upon any one of them, though it is believed the usual practice is to make such service on the depot or station agent of the company, if it have such agent in the county."

Under such a statute it is held that a person who is the acting secretary comes within the purview of the term "local agent." *Cameron & Co. v. Jones*, 41 Tex. Civ. App. 4, 90 S. W. 1129.

Where a statute provides that citation on a foreign corporation may be served upon certain specified officers, or upon any local agent within the state, and that the return of the officer executing the writ shall be indorsed on or attached to the writ, and shall state when the citation was served, and the manner of the service, conforming to the command of the writ, and shall be signed by him officially, and the return of the sheriff recites that service was made by delivering to E. T. F., local agent of the defendant corporation, and the sheriff amended his return so as to show service on C. T. F., but left the return reciting merely that he was agent of the defendant corporation leaving out the fact that he was the local agent in the state, it was held

that the amendment of the return by the sheriff should be considered in connection with the order of the court directing the amendment, and so considering the matter, it was shown that the defendant was summoned by serving its local agent in the state, as required by the statute. *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608.

³ **United States.** *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 49 L. Ed. 1133; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, aff'g 110 Fed. 730; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, aff'g 42 Fed. 112; *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Knapp v. Bullock Tractor Co.*, 242 Fed. 543; *Ryan v. Ohmer*, 233 Fed. 165; *Ostrander v. Deerfield Lumber Co.*, 206 Fed. 540; *Craig v. Welch Motor Car Co.*, 165 Fed. 554; *Case v. Smith, Lineaweaver & Co.*, 152 Fed. 730; *Donovan v. Dixieland Amusement Co.*, 152 Fed. 661; *Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co.*, 141 Fed. 211; *Johnson v. Computing Scale Co.*, 139 Fed. 339; *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605; *Martin v. New Trinidad Lake Asphalt Co.*, 130 Fed. 394; *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008; *Scott v. Stockholders Oil Co.*, 122 Fed.

Thus where at the time of the commencement of an action the

835; *Reilly v. Philadelphia & R. Ry. Co.*, 109 Fed. 349; *Eirich v. Donnelly Contracting Co.*, 104 Fed. 1; *Meeke v. Valleytown Mineral Co.*, 93 Fed. 697; *Rust v. United Waterworks Co.*, 70 Fed. 129; *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. 850; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. 433; *Bentlif v. London & Colonial Finance Corporation*, 44 Fed. 667; *Clews v. Woodstock Iron Co.*, 44 Fed. 31; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 32 Fed. 802; *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. 434; *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635. See, however, *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505; *Houston v. Filer & Stowell Co.*, 85 Fed. 757.

California. *Eureka Mercantile Co. v. California Ins. Co.*, 130 Cal. 153, 62 Pac. 393; *Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308.

Connecticut. *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301.

District of Columbia. *Ambler v. Archer*, 1 App. Cas. 94; *Lathrop v. Union Pac. Ry. Co.*, 7 D. C. 111.

Illinois. *Midland Pac. Ry. Co. v. McDermid*, 91 Ill. 170; *Galveston City Ry. Co. v. Hook*, 40 Ill. App. 547.

Kansas. *J. B. Watkins Land-Mortg. Co. v. Elliott*, 62 Kan. 291, 84 Am. St. Rep. 385, 62 Pac. 1004; *Mutual Reserve Fund Life Ass'n v. Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387.

Louisiana. *Southern Saw Mill Co. v. American-Hardwood Lumber Co.*, 115 La. 237, 112 Am. St. Rep. 267, 38 So. 977. Compare *Payne & Joubert v. East Union Lumber Co.*, 109 La. 706, 33 So. 739, and *Gravely v. Southern Ice Mach. Co.*, 47 La. Ann. 389, 16 So. 866, in which cases, however, it would

seem that the view was taken that the corporation was doing business.

Maryland. *Crook v. Girard Iron & Metal Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94.

Massachusetts. *Peckham v. North Parish in Haverhill*, 16 Pick. 274.

Michigan. *Newell v. Great Western Ry. Co. of Canada*, 19 Mich. 336.

Minnesota. *State v. District Court of Ramsey County*, 26 Minn. 233, 2 N. W. 698; *Guernsey v. American Ins. Co.*, 13 Minn. 278.

Missouri. *Latimer v. Union Pac. Ry.*, 43 Mo. 105, 97 Am. Dec. 378.

Nebraska. *Klopp v. Creston City Guarantee Waterworks Co.*, 34 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819.

New Jersey. *Freeholders of Mercer County v. Pennsylvania R. Co.*, 42 N. J. L. 490; *Camden Rolling Mill Co., v. Swede Iron Co.*, 32 N. J. L. 15; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222, 25 N. J. L. 57; *Puster v. Parker Mercantile Co. (N. J. Eq.)*, 59 Atl. 232.

New York. In *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137, a rule contrary to that stated in the text was announced and service on an officer temporarily in the state was upheld, even though the corporation was not doing business in the state. In later decisions, however, conforming to the decisions of the United States (see cases cited supra, this note), the court changed to the rule announced in the text denying the sufficiency of such service. *Robert Dollar Co. v. Canadian Car & Foundry Co.*, 220 N. Y. 270, 115 N. E. 711; *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, L. R. A. 1916 F 407, Ann. Cas. 1918 A 389, 101 N. E. 1075. For further discussion of the New York decisions, see *infra*, this section.

defendant foreign corporation owned no property, had no place of

Oregon. Aldrich v. Anchor Coal & Development Co., 24 Ore. 32, 41 Am. St. Rep. 831, 32 Pac. 756.

Pennsylvania. Phillips v. Library Co., 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640; Dawson v. Campbell, 2 Miles 170; Nash v. Evangelical Lutheran Church, 1 Miles 78.

South Carolina. Abbeville Elec. Light & Power Co. v. Western Elec. Supply Co., 61 S. C. 361, 55 L. R. A. 146, 185 Am. St. Rep. 890, 39 S. E. 559; Hester v. Rasm Fertilizer Co., 33 S. C. 609, 12 S. E. 563.

Utah. Honerine Mining & Milling Co. v. Tallyday Steel Pipe & Tank Co., 31 Utah 526, 88 Pac. 9.

Washington. Carstens & Earle v. Leidigh & Havens Lumber Co., 18 Wash. 450, 39 L. R. A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051.

West Virginia. Hayman v. Monongahela Consol. Coal & Coke Co., 81 W. Va. 144, 94 S. E. 36.

"Under the general law it would seem that the mere casual presence of an officer of the corporation in the state, not engaged in the business of the corporation, will not suffice to warrant service of process as against the corporation upon him. *St. Clair v. Cox*, 106 U. S. 350, 358, 27 L. Ed. 222. It seems clear from the evidence adduced that Paine was in California purely in his private capacity on a pleasure trip, and not in any wise as representative of defendant corporation. The secretary of a corporation, away from its domicile, 'does not carry the corporation in his pocket.' *Louden Machinery Co. v. American Reliable Iron Co.* (C. C.) 127 Fed.

For this reason I am constrained to hold that motion to quash service of summons as made upon him should be granted. *Premo Co. v. Jersey-Creme Co.*, 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015."

Knapp v. Bullock Tractor Co., 242 Fed. 543.

"We do not understand * * * that if the president of a New Jersey corporation which transacts no business in this state, crosses the Delaware River to dine with a friend on this side, he thereby carries the corporation with him, and subjects it to the jurisdiction of the courts of this state as to contracts made or torts committed in New Jersey. Under such circumstances he is not here in his representative capacity. He is not the corporation, nor does he bring it here. If the rule were otherwise, he would carry the corporation with him upon a trip around the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it." *Phillips v. Library Co.*, 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. 640, quoting with approval *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15, and distinguishing *Usher v. West Jersey R. Co.*, 126 Pa. St. 206, 4 L. R. A. 261, 12 Am. St. Rep. 863, 17 Atl. 597.

Where a foreign corporation is not doing any business in the state, jurisdiction is not acquired over it by the service of process upon its president who was only in the state upon personal business, notwithstanding the defendant had been engaged in business in the state before the service of the summons, and the president had during his visit to the state visited the office of the plaintiff in reference to a contract arising from such business, but which had been completed. *Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co.*, 141 Fed. 211.

Under a statute providing that any foreign corporation which shall trans-

business and was not transacting business in the state, service of process on its vice president who was temporarily in the state on private business which had no connection with the defendant or its business or property, and who while in the state transacted no business for or connected with the defendant, was held to be insufficient and to confer no jurisdiction over the corporation.⁴ And where a corporation was doing no business and had no property in the state, service on a director, casually within the state for a few days is not sufficient to confer jurisdiction upon the court.⁵ Under a statute providing that service of process against a foreign corporation may be made upon "each person or persons, company or firm thus transacting busi-

act business in the state shall be deemed to hold and exercise franchises therein, and shall be liable to suit in any of the courts of the state, on any dealings or transactions therein, a foreign corporation, having no place of business within the state, and having had no dealings or transactions in the state other than the purchase of certain machinery at a sheriff's sale, cannot be served with a writ of replevin to recover the possession of such property by making service upon an agent who was temporarily within the state. *Crook v. Girard Iron & Metal Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94, following *Clews v. Woodstock Iron Co.*, 44 Fed. 31.

Where a foreign corporation which had done no business in the state of New York beyond negotiating a mortgage on its property and having the bonds secured thereby put on the list of the New York Stock Exchange, was served with summons by service of the writ upon its president, who was temporarily in the state of New York attending to other business matters, including the negotiations of such mortgage, it was held that the corporation was not engaged in business in that state and that no jurisdiction over it was acquired by service of summons on its president while temporarily in that state for the pur-

poses named. *Clews v. Woodstock Iron Co.*, 44 Fed. 31, followed in *Crook v. Girard Iron & Metal Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. 94.

A foreign private corporation, maintaining no office or agency in the state, which transports its product to market in its own barges, and by means of its own steamboats along the Ohio River from Pittsburgh to Cincinnati, Louisville and other points, not in West Virginia, is not thereby doing business in West Virginia within the meaning of Chapter 121 of the Code of W. Va. 1913, relating to the service of process. Nor is the captain of one of its steamboats temporarily taking refuge along the West Virginia shores from the perils of navigation caused by floating ice in the river, an agent of the corporation, within the meaning of any of the statutes of the state authorizing service of process or notice on the agent of a foreign corporation. *Hayman v. Monongahela Coal & Coke Co.*, 81 W. Va. 144, 94 S. E. 36.

⁴ *Johnson v. Computing Scale Co.*, 139 Fed. 339. See also *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, aff'g 110 Fed. 730.

⁵ *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959; *Ostrander v. Deerfield Lumber Co.*, 206 Fed. 540.

ness for the corporation," it is held that in an action in which a creditor seeks to obtain a personal judgment against a foreign corporation, process served upon its secretary while temporarily in the state is not sufficient to enable the plaintiff to recover judgment, where the defendant had no property, real or personal, in the state, and beyond isolated transactions, it did not conduct a business in the state, and the transaction which gave rise to a claim on the part of the plaintiff was not brought about by such secretary.⁶ Service on an officer of a foreign corporation temporarily in the state for the mere purpose of employing an engineer is not a legal service on a corporation under a statute providing that foreign corporations, and the officers thereof doing business in the state, shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of the state, and shall have no other or greater powers.⁷

In some cases it has been held that where the statute authorizes service of process upon a certain officer of a foreign corporation, service may be made upon such officer if he is found within the state, even though he may be in the state for the sole purpose of attending to his private affairs and for personal reasons and not on business of the corporation.⁸ Thus under a statute authorizing service of process on a foreign corporation when service can be made personally upon the president, treasurer or secretary thereof, service made upon the president of a foreign corporation, who, found within the state, was held to be valid, although he was in the state on his private business and was not actually engaged in the service of the corporation at the time of service.⁹ By this line of cases, it is said that in order to make such service effective, it is not needful that the officer served should be in the state in his official capacity,

⁶ *Southern Sawmill Co. v. American Hard Wood Lumber Co.*, 115 La. 237, 112 Am. St. Rep. 267, 38 So. 977.

⁷ *Schillinger Bros. Co. v. Henderson Brewing Co.*, 107 Ill. App. 335.

⁸ *Venner v. Denver Union Water Co.*, 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623; *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447, following *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137. See *Cameron & Co. v. Jones*, 41 Tex. Civ. App. 4, 90 S. W. 1129. This view was also taken in New York at one

time. (See *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137, aff'g 24 Hun 238, 60 How. Pr. 419; *Hiller v. Burlington & M. R. R. Co.*, 70 N. Y. 223; *Smith v. Western Pac. R. Co.*, 154 App. Div. 130, 139 N. Y. Supp. 129), but, as seen *infra*, in this section, the contrary rule is followed in the later cases.

⁹ *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137; *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447.

or engaged in the business of the corporation, or that the corporation should have any property in the state, or that the cause of action should have arisen in the state.¹⁰ These cases, however, have no weight

¹⁰ *Sadler v. Boston & Bolivia Rubber Co.*, 202 N. Y. 547, 95 N. E. 1139, aff'g 140 N. Y. App. Div. 367, 125 N. Y. Supp. 405; *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137, quoted with approval in *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447. As the rule which now obtains in New York, see the first note in this section.

In *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447, *Montgomery, J.*, said: "The just and legal foundation for such service rests in the duty of the officer to report such service, and that the corporation would by that means receive notice. A judgment obtained in an action thus commenced would be valid in this state and enforceable against any property at any time found in this state. What effect it would have in another state we need not discuss.

* * * The Court of Errors and Appeals of New Jersey, in the case of *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N. J. L. 222,—a case in which a judgment creditor commenced an action in that state upon a judgment obtained in the state of New York,—the defendant having been a foreign corporation, without property in the state, the cause of action, not having arisen in the state, the corporation having no business in the state, and the president being accidentally in the state on a visit when the summons was served on him, refused to recognize the validity of the judgment. There was no such statutory law, however, in New Jersey as existed in New York in reference to the service of process on foreign corporations."

Under a statute providing that in any suit against a foreign corporation

citation or other process may be served on the president, vice president, secretary, treasurer or general manager, or upon any local agent within the state, of such foreign corporation, it is held that service upon the secretary who was casually within the state on his own private business was sufficient to give the court jurisdiction to render a judgment in rem, even though the corporation had transacted no business in the state. *Cameron & Co. v. Jones*, 41 Tex. Civ. App. 4, 90 S. W. 1129, distinguishing *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. 433; *Bentlif v. London & Colonial Finance Corporation*, 44 Fed. 668, and *Clews v. Woodstock Iron Co.*, 44 Fed. 31, and saying: "These and other cases announcing generally the doctrine that service upon an officer of a foreign corporation casually in the state, and not upon any business of the corporation, does not confer jurisdiction, either expressly or impliedly limit the application of the doctrine to actions in personam, and for the recovery of personal judgments. In the case of *St. Clair v. Cox*, 135 U. S. 350, 27 L. Ed. 222, the judgment under discussion had been commenced by attachment and the property attached had been sold for the satisfaction, in part, of the judgment. With reference to this judgment, the court says: 'The judgment of the district court in Michigan was rendered in an action commenced by attachment. If plaintiffs in that action were, at its commencement, residents of the state, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the

in view of the decisions of the Federal Supreme Court which is the final arbiter of what service of process is sufficient to give the state court jurisdiction to render a personal judgment against a foreign corporation.¹¹ Thus it is held by such court that service of summons within the state upon resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business in the state, and it had designated no agent in the state upon whom service of process could be made.¹² The courts of New York have receded from

validity of the judgment to that extent, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged.' This is the same general doctrine announced in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. * * * Even in cases of action in personam, however, it seems to be held that to render invalid service upon an officer of the foreign corporation casually in the state, it must appear that the corporation was not engaged in business in the state."

11 *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113.

12 *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113. In this case a resident of New York brought suit in a state court of New York against a corporation organized under the laws of Virginia. The case was removed to the federal court of the district. A motion was made in the latter court to set aside the summons and service as null and void, which was granted. In error to review the order which set aside such service of summons, it was urged that the state decisions (*Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. 360; *Hiller v. Burlington & M. River R. Co.*, 70 N. Y. 223, and *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 139) sustained the validity of such service. Mr. Justice McKenna in affirming such order of the lower federal court said: "But granting the existence of a cause of action, it is not

every service upon an officer of a corporation which will give the state court jurisdiction of a foreign corporation. This was declared in *Goldey v. Morning News*, 156 U. S. 518, 29 L. Ed. 517. The case arose in New York and the question presented was 'whether, in a personal action against a corporation which neither is incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation.' As there was a difference between the rulings of the state court of New York and the circuit courts of the United States on the question, it was elaborately considered 'upon principle and in the light of previous decisions of this court.' The decisions were examined, and the question was answered in the negative, and it was announced as 'an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction of a person who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service upon him. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government.' * * *

their former rulings and now hold that service of process upon an

Goldey v. Morning News was affirmed in *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. Ed. 431. The principle announced in *Goldey v. Morning News* covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the state. He must be there officially—there representing the corporation in its business. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.”

In *Carstens & Earles v. Leidigh & Havens Lumber Co.*, 18 Wash. 450, 39 L. R. A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051, the Supreme Court of the state of Washington, in holding that where a foreign corporation had never engaged in business in the state or had any property therein, or an office for the transaction of business therein, or an officer or agent residing in the state, service of process upon the president of the corporation who at the time of service was only casually and temporarily in the state and had since departed therefrom, was insufficient to confer jurisdiction upon the court, said: “It is not questioned, by any of the cases that we have seen, that where a summons has been served upon an officer of a corporation for whose acts the corporation is bound, where the statute provided for a legal service on such agents or parties, the jurisdiction of the state court over foreign corporations attached. But in this case it does not appear to us that service was made under the statute or in any other way that has ever been maintained by any court, viz., by serving an officer of the foreign corporation which had no place of business in the state, such officer being simply temporarily present in the state. And most of the cases cited by appellant, as we before indicated, are cases simply sustaining jurisdic-

tion under statutes which provide for legal service. It is true that in *Hiller v. Burlington & M. R. Co.*, 70 N. Y. 223, a service upon a director of a foreign corporation in the state of New York, while he was there temporarily on his own business, was a good service and a sufficient commencement of the action, although defendant had no property in the state, but in that case it was determined by the court that the contract was made in the state of New York. There the plaintiff had made a contract to enter defendant's service for a term of years, his business being to procure emigrants to purchase and settle on defendant's lands in Nebraska. Plaintiff was bound, under the contract, to maintain during the whole time an office in the city of New York, and was to go to Europe for two or three months to arrange for emigration, and, in accordance with said contract, opened and kept open in the city of New York the office, until the contract was terminated by the defendant. In that case the court very properly held that in an action for services under the contract, and for damages under the breach, it was to be assumed that the parties understood that plaintiff's principal duties under the contract would be discharged in New York City, and that, therefore, the cause of action arose within that state. Substantially the same doctrine was announced in *Pope v. Terre Haute Car & Manufacturing Co.*, 87 N. Y. 137. But the court in those cases was construing a statute vastly different from our statute, and maintained the doctrine that the manner of service depended entirely upon the legislature. These cases, however, stand alone, so far as the announcement of the doctrine is concerned that the service on the officer of a foreign

officer or agent of a foreign corporation is valid only when he is in the state representing the corporation in its business.¹³ It is held

corporation who is temporarily in the state is a good service, with the possible exception of *Klopp v. Waterworks Co.*, 34 Neb. 808, 52 N. W. 819, a Nebraska case; though this case is not in point here, for the reason that the statute of Nebraska was entirely different from our statute, and for the further reason that it was conceded in that case that the debt was contracted in Nebraska, while the finding of the court in this case is to the contrary, and, even if we consider the complaint, there is nothing there that would indicate that the debt had been contracted in this state. The doctrine announced in the New York cases has not been followed by the federal courts. See *Bentlif v. Finance Corp.*, 44 Fed. 667."

13 *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, L. R. A. 1916 F 407, Ann Cas. 1918 A 389, 111 N. E. 1075, rev'g 170 N. Y. App. Div. 594, 156 N. Y. Supp. 647; *Magnolia Metal Co. v. Savannah Supply Co.* (N. Y. Misc.), 157 N. Y. Supp. 355.

"The undisputed evidence is that the defendant's president at the time of service was not in the state of New York on any business or interest of the defendant and that the defendant had no property in this state nor any office therein for the transaction of its business. Under the rules laid down in *Pope v. Terre Haute Car & Mfg. Co.*, 87 N. Y. 137, and followed in numerous cases, such a service as here attempted has been held effectual, despite the fact that the United States Supreme Court has quite uniformly held contrary to the New York state rule. *Sadler v. Boston & Bolivia Rubber Co.*, 140 App. Div. 367, 368, 125 N. Y. Supp. 405, 406, affirmed 202 N. Y. 547, 95 N. E. 1139. In the *Sadler Case*,

supra, the court expressly said: 'Of course, we are bound to follow the rule of our own Court of Appeals, unless that rule is violative * * * of the Federal Constitution, or, the Court of Appeals has itself rescinded the rule in the *Pope Case* and conformed to the rule laid down by the Supreme Court of the United States.' And further on the court referred to the opinion of the Court of Appeals in *Grant v. Cananea Consol. Copper Co.*, 189 N. Y. 241, 82 N. E. 191, in which it was said: 'But it is contended that the provisions of the Code are violative of the provision of the Constitution of the United States, already referred to (i. e., the Fourteenth Amendment). This we cannot admit.' As there had not been any departure by the Court of Appeals from the rule in the *Pope Case*, and as that court had expressly stated in the *Grant Case*, supra, that it would not admit that our Code provisions applicable to the service of process upon a foreign corporation were violative of the due process clause of the Federal Constitution, the Appellate Division was constrained to follow the Court of Appeals. The United States Supreme Court, however, on April 12, 1915, has handed down a decision in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U. S. 189, 59 L. Ed. 910, in which it explicitly holds as void a service upon a resident director of a foreign corporation, where the defendant had not come into the state in which the service was attempted for the purpose of doing business therein and had no property there and no qualified agent therein upon whom process may be served, notwithstanding that such service was effected pursuant to the statutes of the state in which the attempted service was made. The court

in some of the cases that where the officer or agent of the corporation is sent into the state on business of the corporation, service of process upon him confers jurisdiction over the corporation,¹⁴ and that a foreign manufacturing corporation which has made many sales and deliv-

concludes its opinion in the following words: 'It is true that in most of the decided cases questions concerning judgments rendered without a hearing under the circumstances here disclosed have arisen from attempts to enforce such judgments in jurisdictions other than the one wherein they were rendered, presumably because the defense of want of due process was not made until the judgments had been entered and an effort to enforce them was made. But the fact that because unobservedly or otherwise judgments have been rendered in violation of the due process clause and their enforcement has been refused under the full faith and credit clause affords no ground for refusing to apply the due process clause and preventing that from being done which is by it forbidden and which if done would be void and not entitled to enforcement under the full and credit clause. The two clauses are harmonious and because the one may be applicable to prevent a void judgment being enforced affords no ground for denying efficacy to the other in order to permit a void judgment to be rendered.' We have thus a construction by the highest tribunal in the land in effect overruling the Court of Appeals that such a service as was here attempted is violative of the United States Constitution and that it is the duty of the court to prevent that from being done which is forbidden by the due process clause. The mandate of the United States Supreme Court makes it incumbent upon this court to hold the service of the summons and complaint upon the president of the defendant corporation ineffective and compels the vacation of such service.' Mag-

nolia Metal Co. v. Savannah Supply Co. (N. Y. Misc.), 157 N. Y. Supp. 355.

See also Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 432, L. R. A. 1916 F 407, Ann. Cas. 1918 A 389, 111 N. E. 1075, rev'g 170 N. Y. App. Div. 594, 156 N. Y. Supp. 647, holding that service of process upon the president of a foreign corporation was valid only when he was in the state representing the corporation officially in its business. Cardozo, J., said: "It is true that even the president of a foreign corporation may be here without bringing the corporation itself within this jurisdiction. He must be here 'officially, representing the corporation in its business.' Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113; Kendall v. American Automatic Loom Co., 198 U. S. 477, 49 L. Ed. 1133; Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517. To give judgment in violation of that rule is to condemn the corporation unheard, and to ignore the essentials of due process of law. Dicta to the contrary in Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 N. E. 191, must yield to the later decision in Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 192, 59 L. Ed. 910. But when a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted. That was held in Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. Ed. 964."

¹⁴ Rush v. Foos Mfg. Co., 20 Ind. App. 515, 51 N. E. 143.

eries in a state, and is present there through an agent sent into the state in connection with the corporation's business, with power to receive moneys for sales or to adjust controversies arising out of sales, may be served with process through such agent in a suit arising out of such business.¹⁵ Under a statute providing that where a foreign corporation has no office or place of business in the state, service of process may be made upon an officer, agent or employee transacting business for it in the state, an agent of a foreign corporation which has no office or place of business in the state, and never transacted any business therein, who is sent into the state by it to investigate a claim for damages for personal injuries inflicted in another state, is not transacting business in the state for the corporation so as to be subject to such service of process.¹⁶ The casual return of an officer for a single transaction of business for the corporation though related to its former contracts is not such a return as enables him to be served so as to give the court jurisdiction to render personal judgment against it.¹⁷

Where the officer upon whom the process was served was a general officer of the defendant foreign corporation who was temporarily in the state at the time of the service engaged in attempting to adjust the differences between the corporation and the plaintiff in the matter upon which the plaintiff based his right to recover, and such service was made while such negotiations were in progress, it was held that such service conferred jurisdiction upon the court over the corporation, and a plea to the jurisdiction was overruled.¹⁸ Consequently where the defendant foreign corporation is doing business in the state, service upon its secretary temporarily in the state for the purpose of adjusting, and engaged in adjusting the corporate liability upon which

¹⁵ *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. Ed. 1479; *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 56 L. Ed. 857; *Chicago Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111; *New Haven Pulp & Board Co. v. Dowington Mfg. Co.*, 130 Fed. 605. See also *Payne & Joubert v. East Union Lumber Co.*, 109 La. 706, 33 So. 739; *Gravely v. Southern Ice Mach. Co.*, 47 La. Ann. 389, 16 So. 866.

¹⁶ *Painter v. Colorado Springs & C. C. Dist. R. Co.*, 127 Mo. App. 248, 104 S. W. 1139.

¹⁷ *Noel Const. Co. of Baltimore City v. George W. Smith & Co.*, 193 Fed. 492. See also § 2957, *supra*, §§ 6042, 6045, 6046, *infra*.

¹⁸ *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505; *Houston v. Filer & Stowell Co.*, 85 Fed. 757; *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640. See, however, *William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.*, 174 Fed. 131, distinguishing *Houston v. Filer & Stowell Co.*, 85 Fed. 757; *Loudon Machinery Co. v. American Malleable Co.*, 127 Fed. 1008.

the suit was brought is sufficient to confer jurisdiction upon the court

See § 6021, *supra*.

In *Brush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co.*, 136 Fed. 505, in holding that where the officer upon whom the process was served was a general officer of the defendant corporation and who came into the state for the purpose of adjusting a controversy between the corporation and the plaintiff in reference to the matter upon which the suit was based, service upon him conferred jurisdiction over the corporation, the court said: "The Supreme Court has not delivered any clear decision upon this state of facts, but much of the language employed in the leading case of *St. Clair v. Cox*, 106 U. S. 350, throws a strong indirect light upon the question. That opinion quotes from the case of *Newell v. Great Western Railway Co.*, 19 Mich. 336, where the service was made upon the treasurer of the defendant company in the state of Michigan while he was there on private business. The whole ground of the reasoning of the Michigan court, which is quoted, goes to the effect that, if the treasurer had been in the state of Michigan on any business of the corporation, the court would then have acquired jurisdiction of the corporation by service upon him. Commenting upon that case the Supreme Court said: 'According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state. This representation implies that the corporation does business or has business in the state for the transaction of which it sends or appoints an agent there.' Later in the opinion, at page 359 of 106 U. S., the court says: 'The transaction of business by the corporation in the state, general or spe-

cial, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose.' Much of what is said in this case goes to the question whether the agent upon whom process was served was of sufficiently high grade so that he could be 'properly deemed representative of the foreign corporation.' As bearing upon that question, the fact whether the company was actually engaged in business in the state, and the extent of the business committed to the management of the agent, would be material. But if the officer served as a general officer of the corporation, then the extent of the business transacted by him in the state is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of *Houston v. Filer & Stowell Co.*, 85 Fed. 757, and it was there held that, when the manager of a corporation goes into another state on the business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there, although the corporation does not transact business in the state so as to make it an inhabitant thereof. In my judgment, the opinion in this

over the corporation, and a judgment by default against it based on such service will not be set aside.¹⁹

§ 6042. Service upon salesmen of foreign corporation. Frequently a corporation sends into a state other than that by which it was incor-

porated is a correct exposition of the law. Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption. It ought to be held to be present in any state to which it sends its general officer for the transaction of its corporate business. The case of *St. Louis Wire-Mill Company v. Consolidated Barb Wire Company et al.*, 32 Fed. 802, arising in this circuit, and decided by Judge Thayer, does not present the precise question, for the officer upon whom service was made did not enter the state for the purpose of carrying on any business on behalf of the corporation, but came there for the purpose of attending a fair at St. Louis; and the question now under consideration is not considered in the opinion. The case of *Eirich v. Donnelly Contracting Company (C. C.)*, 104 Fed. 1, is in point, but seems to have been decided upon a misapprehension of the law. The court there quashed the service upon the ground that the defendant was not 'found' in the district of Ohio; evidently basing the decision upon the earlier federal statutes requiring that the defendant be found in the district as a condition of federal jurisdiction. But under the present statute it is sufficient to confer jurisdiction if the plaintiff is a citizen of the district where the action is brought and service is obtained on the defendant. The facts in the case of *Clews v. Woodstock Iron Company (C. C.)*, 44 Fed. 31, would also bring the case within the question now raised, but the question is not discussed in the opinion, although the decision is adverse to

the validity of the service. The case of *United States Graphite Co. v. Pacific Graphite Company (C. C.)*, 68 Fed. 442, is likewise in point on its facts, and held against the validity of the service; but the distinction which is pointed out by Judge Grosscup in the case in 85 Fed. 757, is not adverted to in the opinion."

A corporation is not necessarily found in another state merely because its general manager may be there, but when he is in such state under charge of the corporation to do something with respect to the business upon which the suit is brought and when his being there is not the result of fraudulent enticement, there is no reason why service upon him is not service upon the corporation, or why the corporation is not, in his person and during the time covered by his presence for such a purpose, itself present in the state. *Houston v. Filer & Stowell Co.*, 85 Fed. 757.

"Nor could the defendant object, if while here upon the primary purpose of a pleasure trip, he exercised his official connection with the company in the conduct of its ordinary business, and was served in such capacity. But if the company did no business in the usual course in the state of New York, if it maintained no office, and if it carefully observed the rights of the New York corporation, so as to leave to the New York corporation all business within this state, a different situation is presented." *Chatfield, J.*, in *Smithson v. Roneo*, 231 Fed. 349.

¹⁹ *Fond du Lac Cheese & Butter Co.*

porated traveling salesmen to solicit orders for the products of its manufacture, and there arises the question what is the effect of service of process upon such a traveling salesman in an action brought against the corporation in such state. It is settled by numerous decisions that the procuring of orders in the state by traveling agents of a foreign corporation, with or without samples, or the sale of goods in a state by samples, where the orders are sent to a foreign corporation for its approval in the foreign state, from which the goods are shipped to the purchaser in the former state, does not constitute doing business in such state, where such foreign corporation had no place of business therein, and that service of process upon such traveling salesman in an action against the foreign corporation is insufficient to confer jurisdiction upon the court over the foreign corporation, under a statute providing for the service of process upon an agent of a foreign corporation "doing business" in the state.²⁰ Jurisdiction of a foreign corporation is not obtained by service upon one who has mere authority to sell goods of the corporation at a specified price.²¹ A traveling salesman sent into the state to confer with a person in regard to a difference between him and the foreign corporation, and to make to such person definite propositions with a view to adjusting the differences and also to report to his principal any counter propositions such person might make, and having authority to take orders for machinery manufactured by it, and required to report the same to his employer for approval, but no power to make an absolute sale, is not an agent upon whom process may be served within the meaning of a statute providing that service can be had upon an agent of a foreign corporation only in case that the corporation is "doing business" in the state.²² Under a statute providing that the summons or any process in any civil action or proceeding wherein a foreign cor-

v. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640.

²⁰ American Oil & Supply Co. v. Western Gas Const. Co., 239 Fed. 505; Fawkes v. American Motor Car Sales Co., 176 Fed. 1010; William Grace Co. v. Henry Martin Brick Mach. Mfg. Co., 174 Fed. 131; Hefner v. American Tube & Stamping Co., 163 Fed. 866; Strain v. Chicago Portrait Co., 126 Fed. 831; Boardman v. S. S. McClure Co., 123 Fed. 614; Adams Mach. Co. v. Castleberry, 84 Ark. 573, 106 S. W. 940; Hodge v. Acorn Brass Mfg. Co., 50 N. Y. Misc. 627, 98 N. Y. Supp.

673; Frankel v. Dover Mfg. Co., 104 N. Y. Supp. 459.

See §§ 5770, 5922, *supra*.

Where a foreign corporation had an agent in the state upon whom process might be served, service made upon a traveling salesman who had no control over the business of the corporation was held insufficient. Adams Mach. Co. v. Castleberry, 84 Ark. 573, 106 S. W. 940.

²¹ Hodge v. Acorn Brass Mfg. Co., 50 N. Y. Misc. 627, 98 N. Y. Supp. 673.

²² William Grace Co. v. Henry Martin Brick Mach. Mfg. Co., 174 Fed.

poration is defendant, which has property within the state, or the cause of action arose therein, may be served by delivering a copy of such summons or process to the president, secretary, or to any agent of such corporation, and such service shall be of the same force, effect and validity as like service upon domestic corporations, it is held that a jobbing corporation which has traveling men through the country to solicit orders for goods or wares cannot be held to be doing business wherever those solicitors go, so as to be liable to be served with process by delivering copies of the process to such traveling men going about the country.²³ A salaried employee of a foreign corporation, engaged in publishing books, periodicals and magazines, who comes into the state for the purpose of soliciting and taking orders for advertising in such magazine, having power only to quote rates as fixed by the corporation at its home office, and his orders as to space and copy being subject to the approval of the home office, and who cannot make definite contracts, but takes orders and submits them for approval to the corporation, which, through its home office, makes all collec-

131, distinguishing *Houston v. Filer & Stowell Co.*, 85 Fed. 757.

²³ *Boardman v. S. S. McClure Co.*, 123 Fed. 614. *Lochren, J.*, said: "They would not be transacting a general business of the corporations, which would be to sell goods—either goods that they were dealing in, or goods that they were manufacturing. Many manufacturing foreign corporations are doing business here. Many who are manufacturing farm machinery have warehouses in St. Paul and Minneapolis, and probably places in different other states where they keep their machinery for sale and sell it, and have their agents in charge making sales. No doubt they are doing business in the state. But I think that this is different from a case where they merely send agents through the country to solicit orders, either from those who use the articles, or from dealers in the articles."

In *Strain v. Chicago Portrait Co.*, 126 Fed. 831, the above language in *Boardman v. S. S. McClure Co.*, 123 Fed. 614, was quoted with approval.

Under a statute requiring foreign

corporations doing business in the state to establish an office or agency, file articles of incorporation, and be subject to local visitation, regulation and the payment of taxes on its business, but excepting from its operation "drummers or traveling salesmen, soliciting business for foreign corporations which are entirely nonresident," and another statute providing that where a foreign corporation has not complied with the former statute, service of process may be made by serving an agent of the corporation wherever he may be found, it was held, in an action for malicious prosecution against a foreign corporation which had no office or agent in the state, service of process upon an agent who solicited business for the corporation and who received a commission on the business obtained for it, but who was not connected with the transaction out of which the cause of action arose, was insufficient to confer jurisdiction over the corporation, as he was not an agent within the meaning of the statute. *Strain v. Chicago Portrait Co.*, 126 Fed. 831.

tions and fixes the terms of payment, is not an agent upon whom service of process may be made within the meaning of such a statute.²⁴

Some of the statutes expressly except from their operation drummers or traveling salesmen, soliciting business in the state for foreign corporations. It is held that the term "drummer" and "traveling salesman" have a well-known popular meaning. They are employees of foreign corporations, employed to drum up and solicit business for the houses they represent.²⁵

In some jurisdictions, however, it is held that under the statutes there obtaining, service of process upon the traveling salesmen of a foreign corporation is sufficient to confer jurisdiction upon the court.²⁶ Thus under a statute providing that where the cause of action arose in the state service of process may be made upon any officer or agent of the corporation, it is held that service upon a traveling salesman selling the goods of a foreign corporation was sufficient to confer

²⁴ Boardman v. S. S. McClure Co., 123 Fed. 614.

²⁵ Strain v. Chicago Portrait Co., 126 Fed. 831, quoting with approval Boardman v. S. S. McClure Co., 123 Fed. 614, 617; Bragdon v. Perkins-Campbell Co., 19 Pa. Co. Ct. Rep. 305; Abbeville Elec. Light & Power Co. v. Western Electrical Supply Co., 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559.

²⁶ Ryerson v. Steere, 114 Mich. 352, 72 N. W. 131; Duluth Log Co. v. Pulpwood Co., 137 Minn. 312, 163 N. W. 520; Hagerty v. National Fur & Tanning Co., 137 Minn. 119, 162 N. W. 1068; Abbeville Elec. Light & Power Co. v. Western Elec. Supply Co., 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 890, 39 S. E. 559.

A person sent into the state by a foreign corporation to solicit orders for sales of its products is an agent upon whom process against the corporation may be served. Duluth Log Co. v. Pulpwood Co., 137 Minn. 312, 163 N. W. 520.

Under Gen. St. Minn. 1913, § 7735, subdiv. 3, it is held that service of process may be made upon a salesman

of a foreign corporation who not only solicits orders for work to be done in another state but also is vested with authority to act in respect to a contract for work made in the state. Hagerty v. National Fur & Tanning Co., 137 Minn. 119, 162 N. W. 1068.

In Iowa, where an action is brought against a foreign corporation for breach of warranty arising out of a sale of an automobile manufactured by it, service upon its sales agent is sufficient to confer jurisdiction of the corporation under Iowa Code, § 3532. Pugh v. A. D. Bothne Co., 178 Iowa 601, 159 N. W. 1030. See also Morey v. Standard Separator Co., 174 Iowa 530, 156 N. W. 719, construing Iowa Code, § 3532.

Under R. S. Ill., c. 110, § 8, service of process upon a sales agent of a foreign corporation, which is engaged in selling in the state automobiles manufactured by it is sufficient to confer jurisdiction over the corporation, where such sales agent was appointed by a general agent of the corporation and recognized as such sales agent by the foreign corporation. R. M. Owen & Co. v. Johnson, 184 Ill. App. 90.

jurisdiction upon the court in an action against such corporation based upon a cause of action arising in the state.²⁷ It was held in South Carolina that where a foreign corporation had no resident agent in the state, service of process upon a traveling salesman who came into the state with relation to the particular transaction out of which the suit arose was deemed to be sufficient to confer jurisdiction upon the court in an action against the corporation.²⁸

§ 6043. Service on officer or agent fraudulently brought within jurisdiction. Where the officer or agent of a foreign corporation is induced to come into a state by a deception practiced upon him for the purpose of serving the summons upon him in an action against the foreign corporation, such service will be set aside.²⁹ Where a policyholder in a fire insurance company under a pretext of desiring to secure his receipt for the payment of the premium on his policy at the time of payment induced the corporation to send such receipt to the cashier of a bank in the state with instructions to deliver it on payment of the premium called for, and in pursuance of his plan, after payment of the premium and delivery to the policyholder of the receipt, summons was served on the cashier of the bank as the

²⁷ *Ryerson v. Steere*, 114 Mich. 352, 72 N. W. 131.

²⁸ *Abbeville Electric Light & Power Co. v. Western Elec. Supply Co.*, 61 S. C. 361, 85 Am. St. Rep. 890, 55 L. R. A. 146, 39 S. E. 559, quoting with approval *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, and distinguished in *Jenkins v. Penn. Bridge Co.*, 73 S. C. 526, 53 S. E. 991.

²⁹ *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Cavanagh v. Manhattan Transit Co.*, 133 Fed. 818; *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259; *Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co.*, 60 Minn. 142, 62 N. W. 115; *Olean St. Ry. Co. v. Fairmont Const. Co.*, 55 N. Y. App. Div. 292, 67 N. Y. Supp. 165.

See § 2988, *supra*.

"It appears that this person, who was the managing director (that is, the official head of the corporation under the English law), was in the

United States upon a pleasure trip. While here he looked into certain matters or had certain negotiations with some four parties who were seeking to enter into business relations with the defendant corporation. In each instance this managing director apparently confined his activities to preliminary discussion or negotiations, and carefully left the making of any contract for formal action by the corporation in England. It appears from the records that the defendant corporation owned a certain amount of stock in a New York corporation, which maintained an office here and conducted a somewhat similar business. The defendant left the ordinary business transactions to the New York corporation, as within its territory. Under these circumstances, it could not be said that the managing director was improperly enticed within the state, or that he was brought here under compulsion." *Smithson v. Roneo*, 231 Fed. 349.

agent of the insurance company in an action against the corporation by the policyholder, who relied upon a state statute providing that any person "who collects any premium for insurance shall be deemed the agent of the insurance company, unless he receives no compensation for it," it was held that the plaintiff having entrapped the corporation within reach of a summons, he could not retain the advantage thus fraudulently secured, and a judgment by default against it would be set aside.³⁰

§ 6044. Service on an officer coming into state as a witness. It is a general rule that a person who attends a trial voluntarily, or under process as a witness, or as a party, is privileged from arrest on civil process and from service of summons.³¹ An officer of a foreign corpo-

³⁰ *Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co.*, 124 Fed. 259. The court said: "But there is still another ground on which the service must be declared invalid. It was secured by a trick which the law will not countenance. The assumed reluctance of the plaintiff Wilcox to remit his money to the home office to pay for the renewal of his policy was made out of whole cloth. It was a mere pretense to entrap the company into doing something which, as he assumed, would make it liable to suit in the courts of Wisconsin for the disputed bill of the firm. If his position was correct, that the collection of his premium through Joyce was the transacting of business by the company within the state, and made Joyce its agent, he thereby induced both the company and Joyce to violate the law of the state * * * ; and Joyce, in undertaking to act as agent without a license, to commit a misdemeanor. But the company did not wittingly offend. Whatever was done was solely in response to the suggestion of Wilcox, and for his assumed security and accommodation, and it is therefore to be laid to his charge. Having enticed the company within reach of a summons in this way for the benefit of his firm—Mr. Bundy, another member

of it, being also a party to the scheme—clearly the plaintiffs cannot retain the advantage thus fraudulently secured, to say nothing of the violation of law involved. It is said by Fuller, C. J., in *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608: 'If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside.' "

³¹ *United States. Skinner & Mounce Co., Ltd. v. Waite*, 155 Fed. 828; *Kauffman v. Kennedy*, 25 Fed. 785; *Wilson Sew. Mach. Co. v. Wilson*, 23 Blatchf. 51, 22 Fed. 803.

Arkansas. Martin v. Bacon, 76 Ark. 158, 113 Am. St. Rep. 81, 6 Ann. Cas. 336, 88 S. W. 863.

California. Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 478, 41 Pac. 328.

Illinois. Greer v. Young, 120 Ill. 184, 11 N. E. 167, rev'g 17 Ill. App. 106.

Indiana. Wilson v. Donaldson, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. 250.

Iowa. Murray v. Wilcox, 122 Iowa 188, 64 L. R. A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087.

ration who comes into the state for the purpose of giving testimony is privileged from service of summons in an action against the corporation while he is so in attendance as a witness, and a service made under such circumstances will be set aside.³² Service of process upon

Kansas. Bolz v. Crone, 64 Kan. 570, 67 Pac. 1108.

Maryland. Bolgiano v. Gilbert Lock Co., 73 Md. 132, 25 Am. St. Rep. 582, 20 Atl. 788.

Michigan. Letherby v. Shaver, 73 Mich. 500, 41 N. W. 677; Mitchell v. Huron Circuit Judge, 53 Mich. 541, 19 N. W. 176.

Minnesota. First Nat. Bank of St. Paul v. Ames, 39 Minn. 179, 39 N. W. 308; Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549.

Nebraska. Berlet v. Weary, 67 Neb. 75, 60 L. R. A. 609, 108 Am. St. Rep. 616, 2 Ann. Cas. 610, 93 N. W. 238; Linton v. Cooper, 54 Neb. 438, 69 Am. St. Rep. 727, 74 N. W. 842.

New Jersey. Mulhearn v. Press Pub. Co., 53 N. J. L. 153, 11 L. R. A. 101, 21 Atl. 186; Massey v. Colville, 45 N. J. L. 119, 46 Am. Rep. 754; Dungan v. Miller, 37 N. J. L. 182; Halsey v. Stewart, 4 N. J. L. 366.

New York. Person v. Grier, 66 N. Y. 124, 23 Am. Rep. 35; Goldsmith v. Haskell, 120 App. Div. 403, 105 N. Y. Supp. 327.

North Carolina. Greenleaf v. People's Bank of Buffalo, 133 N. C. 292, 63 L. R. A. 499, 98 Am. St. Rep. 709, 45 S. E. 638; Cooper v. Wyman, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947.

Ohio. Barber v. Knowles, 77 Ohio St. 81, 14 L. R. A. (N. S.) 663, 11 Ann. Cas. 1144, 82 N. E. 1065.

Pennsylvania. Hayes v. Shields, 2 Yeates 222.

South Carolina. See Breon v. Miller Lumber Co., 83 S. C. 221, 24 L. R. A. (N. S.) 276, 137 Am. St. Rep. 803, 65 S. E. 214.

Tennessee. Sewanee Coal, Coke &

Land Co. v. W. W. Williams & Co., 120 Tenn. 339, 107 S. W. 968.

Texas. Feibleman v. Edmonds, 69 Tex. 334, 6 S. W. 417.

Wisconsin. Cameron v. Roberts, 87 Wis. 291, 41 Am. St. Rep. 43, 58 N. W. 376.

See § 2988, supra.

³² Mulhearn v. Press Pub. Co., 53 N. J. L. 153, 11 L. R. A. 101, 21 Atl. 186, where it was held that the vice president of a foreign corporation, who came into the state to give testimony before a court commissioner, which testimony was to be used on a motion to set aside the service of summons issued in an action against such corporation made in the state upon a person supposed to be the agent of such corporation, was privileged from the service of summons in another action against such corporation while he was so in attendance as a witness, and a service made upon such vice president under such circumstances would be set aside. The court said: "The witness upon whom service was made in the present case was in attendance, according to the rules of practice of the Supreme Court commissioner, upon a rule taken in a cause brought in that court. The attendance of witnesses was essential to establish the contention of the defendants that the court had no jurisdiction over them. If we should deny to their witnesses produced upon this rule the privilege so generally conferred, we should fly in the face of the reason upon which the privilege is based, for the rule in which this testimony was to be used lay at the threshold of defendant's defense. It is clear that the occasion was one

the secretary of a foreign corporation who has come into the state for the purpose of attending to the taking of depositions in an action to which the corporation is a party, is insufficient to give a federal court jurisdiction over the corporation.³³

A managing officer of a foreign corporation who is in the state for the sole purpose of attending a sale of land in which the corporation is interested, the sale being made under a judicial decree of the federal court in an action in which the corporation was a party, is not in attendance upon a judicial proceeding so as to be exempted from service of process in an action against the foreign corporation.³⁴

§ 6045. Effect of termination of agency on service. Service of process upon one who had ceased to be an officer or agent of the foreign corporation prior to the time of such service has been held insufficient

when the attendance of a person as a witness clothed him with immunity from service of civil process. Nor do I think that the fact that the witness upon whom the service was made was not himself the defendant in the action in which the process was issued, but was an officer of the corporation defendant, deprives him of the privilege of immunity of service. Corporations, while distinct entities, act, and are acted upon, only through their officers or other agents. Any service of process, in its character personal, must be upon an officer or agent. When a person happens to be an agent or officer, a service upon whom is a service upon a corporation in a foreign jurisdiction, service upon him in his representative character is quite as likely to be as inimical to the rule of privilege as if the service was made in an action brought against the officer personally. The interest of the officer in the corporation which he represents would naturally deter him from a course of conduct which would operate to the prejudice of his corporation. The repugnance of an officer to have his corporation drawn into litigation in a foreign jurisdiction would be quite as likely to keep him at home as if it was merely the danger

of service in a personal action. The test is, as already observed, whether the liability to service is calculated to deprive parties of the testimony of witnesses living away from the place of trial. There is no reason therefore, for the nonapplicability of the rule that service of civil process upon a witness while going to, attending, and returning from a trial will be set aside. It may be remarked that the fact that the actions in which the party was a witness and in which he was served were against the same defendants can make no difference in the application of the rule. The defendants were entitled to the testimony of the officer in the first action. To obtain that evidence they were not compelled to submit to service here. The rule which protects parties from service in another when attending the trial of one suit, covers this feature of the present case."

³³ Ladd Metals Co. v. American Min. Co., 152 Fed. 1008.

³⁴ Greenleaf v. People's Bank of Buffalo, 133 N. C. 292, 63 L. R. A. 499, 98 Am. St. Rep. 709, 45 S. E. 638, distinguishing Cooper v. Wyman, 122 N. C. 784, 65 Am. St. Rep. 731, 29 S. E. 947.

to bind the corporation.³⁵ In an action against a foreign corporation, service of summons upon a person whose only connection with the defendant company was a contingent one that had ceased before the action was commenced is not service upon an agent of the company, within the meaning of a statute authorizing service of process upon an agent of a foreign corporation.³⁶

Under a statute providing that the agency of one appointed by a foreign corporation to represent it in the state shall continue until another agent has been substituted by a writing filed with the department of state, service on the agent designated is sufficient to bring the corporation into court where, although the corporation has revoked the power of such agent and has filed a copy of the revocation with the secretary of state, it has appointed no other agent.³⁷ Also it is

³⁵ *Garvey v. Compania Metalurgica Mexicana*, 222 Fed. 732. See *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 56 L. Ed. 857.

A motion to set aside service of summons on the ground that the person served was not an officer or director of the corporation should be granted when it appears that such person resigned as officer and director five days before he was served. *Continental Wall-Paper Co. v. Lewis Voigt & Sons Co.*, 106 Fed. 550. See also *Sturgis v. Crescent Jute Mfg. Co.*, 57 Hun (N. Y.) 587, 10 N. Y. Supp. 470; *Ervin v. Oregon Steam Nav. Co.*, 22 Hun (N. Y.) 598.

See for effect of service upon an officer continuing to act as such after his resignation, *Cameron & Co. v. Jones*, 41 Tex. Civ. App. 4, 90 S. W. 1129.

For facts held not sufficient to terminate the authority of an agent of a foreign corporation to receive service of process in an action against it, see *Rath v. Ohio German Ins. Co.*, 132 N. Y. App. Div. 692, 117 N. Y. Supp. 382, where the agent attempted to terminate the relationship by letter.

³⁶ *Haas v. Security Ins. Co.*, 57 N. J. L. 388, 30 Atl. 430.

The proprietor and president of a bank to which borrowing members of

a foreign building and loan association pay their dues, and indebtedness to be transmitted to the office of the association in another state, and which had no authority to make such collections and remittances, or instructions as to the handling of them, but performed the work simply in the course of a general banking business, is not an agent of the association upon whom service of process could be made, where at the time of the institution of the suit such course of business had ceased, and the affairs and property of the association had been theretofore placed in the hands of a receiver, and it was not transacting any business whatever, and its officers and agents had been enjoined from representing it, or taking any action whatsoever with relation to its affairs. *Cooper v. Brazleton*, 135 Fed. 476.

³⁷ *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822. Vice Chancellor Garrison said: "As has heretofore been pointed out, it has been held that the permission of the state for a foreign corporation to come in upon certain conditions, and the acceptance of such terms by the corporation, does not constitute a contract. *Conn. Mut. Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L. R. A. 442; *Id.*, 172 U. S. 602, 43 L. Ed. 569, I think that

held that if a corporation of one state establish an agency and transact business in a foreign state and specially authorize an agent to receive service of process, the corporation has recognized the laws of that state, and is bound by process served upon such agent at any time before the suitor has notice of the termination of such agency.³⁸

it might properly be said that it fixed the status of corporations which accepted the terms of such acts. It should also be observed that there is no provision in the statute for the secretary of state to keep any docket, and any such book would not be a legal record of which the public would be affected with notice. Besides which, the notice there given was merely that the company had 'withdrawn from the state,' not that it had revoked the agency of Elliott. Furthermore, it should be noted that the act under which the company entered provides 'that the agency so designated shall continue in force until revoked in writing and some other citizen of New Jersey corporation shall be substituted therefor.' * * *

The amended act now in force provides, 'The agency so constituted shall continue until the substitution, by writing, of another agent.' * * * It would, of course, be erroneous to consider these agencies as if they were ordinary contractual agencies. I mean by this an agent who is selected by the corporation to transact some portion of its business, or do some act or acts for it, is such agent by contract, and if he is served with process, for instance, the question may very well arise whether he had not been discharged as agent previous to the service. Even in such cases it is held that notice of the discharge, to be effectual against the complainant, must be given to the complainant, and not solely to the agent. *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67, 44 Am. Dec. 412; *Gibson v. Ins. Co.*, 144 Mass. 81, 10 N. E. 729. But a

reading of the cases heretofore cited upon the question of the appointment of agencies under statutes such as we are considering carries conviction, that this legal agency is not to be governed by the rules relating to contractual agency, and that the corporation may not defeat the very purpose of the act by discharging the agent. It is not necessary to enlarge upon the fatuity of legislation which would permit a foreign corporation to come within the state and transact business upon condition that it name an agency upon whom process should be served, and leave it within the power of the corporation to prevent service by discharging the agent and revoking his authority whenever it pleased, leaving suitors within the state powerless to bring the corporation into court. As was said in *Mut. Res. Fund Life Ass'n v. Phelps*, 190 U. S. 147: 'It would obviously thwart the purpose (namely, the having of an agency to be served) if this association * * * should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all parties to seek the courts of New York for the enforcement of their claims.' And in that case, although the company was forced out of the state, the court held the agency continued. See also *Conn. Mut. Life Ins. Co. v. Duereson*, 28 Grat. 630, 644."

³⁸ *Michael v. Mutual Ins. Co.* of Nashville, 10 La. Ann. 737; *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67, 44 Am. Dec. 412, cited with approval in *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822.

Under a statute requiring a foreign corporation doing business in the state to appoint an attorney at law in each county where its agencies were established, and to file with the territorial auditor an instrument which should authorize such attorney to acknowledge service of legal process and also consenting that any service of process on such attorney should be taken and held to be valid as if served upon the company, it was held that where a foreign insurance corporation doing business in the state had appointed an agent to receive service of process, such appointment was irrevocable, unless the revocation was made by the appointment, duly notified upon the public records, of a new agent, competent to receive service of process in regard to any controversies arising upon contracts previously entered into.³⁹ Where, by statute, a foreign insurance corporation was not authorized to grant policies in the state or make renewals therein, until it had appointed an agent in the manner prescribed by the statute, and was not allowed to revoke the authority of such agent until it had appointed another in his place, so long as any of its obligations in the state remained unsatisfied, it was held that though a foreign insurance company had expressly revoked the power of its resident agent which it had previously appointed and had never afterwards appointed another in his place, service of process on such agent was nevertheless effectual to give jurisdiction of an action against such corporation.⁴⁰ Under a statute providing that "Where a corporation * * * has,

³⁹ *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81, 10 N. E. 729, cited with approval in *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822.

⁴⁰ *Connecticut Mut. Life Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630, cited with approval in *Groel v. United Elec. Co. of New Jersey*, 69 N. J. Eq. 397, 60 Atl. 822.

See *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 56 L. Ed. 857, for facts held not to terminate agency so as to make service of process ineffectual.

Under a statute making it unlawful for a foreign corporation to do business in the state without having a place of business therein and a registered authorized agent in the same, and requiring a statement to be filed in the office of the secretary of state

showing the name and purpose of the corporation, the location of its offices and the name or names of its authorized agent or agents, it is held that it is not required that the registered agent shall stand in any other relation to it than its agent upon whom process may be served, and that notwithstanding the agent had parted with his interest in the company or, for that matter, had withdrawn or resigned from his place as secretary and treasurer, he remained the agent of the company for the purposes of process, and process served upon him as such agent would be legal and valid as binding upon the company. *Germanatown Dairy Co. v. McCallum*, 223 Pa. 554, 72 Atl. 885, quoting with approval *De La Vergne Refrigerating Mach. Co. v. Kolischer*, 214 Pa. 400, 63 Atl. 971.

for the transaction of any business any office or agency in any county other than that in which the principal resides, service may be made upon any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency," it is held that where a foreign corporation had entered into a contract with a person for the sale of machinery for a specified time, and after the expiration of such period, such agent had some of the property furnished him under the contract in his hands unsold, the agency had not expired, and service of process against him, in an action against the corporation to recover for a breach of warranty of a machine sold to the plaintiff by such corporation through such agent, was binding upon the corporation.⁴¹

It has been held, however, that the appointment of an agent revokes the agency of one previously appointed, and thereafter service upon the previous agent is ineffective.⁴² Service of process may be made upon the managing agent of a foreign corporation who is engaged in erecting a building in the state, notwithstanding he had been ordered to leave the state and proceed to another state at the time he was served.⁴³

§ 6046. Effect of withdrawal of corporation from the state. Where a corporation, after entering the state, transacting business therein and appointing an agent to receive service of process, has subsequently withdrawn from the state, serious question has arisen as to whether service upon the agent so appointed is binding on the corporation after such withdrawal. It has been generally held that service upon such former agent is sufficient where the matter in controversy has arisen out of business transacted in the state by the corporation

⁴¹ *Brunson v. Nichols*, 72 Iowa 763, 34 N. W. 289; *Gross v. Nichols*, 72 Iowa 239, 33 N. W. 653.

⁴² *Mullins v. Central Coal & Coke Co.*, 73 Ark. 333, 84 S. W. 477. The court said: "While it is true that there is nothing in the law which prevents a foreign corporation from having in this state more than one agent upon whom summons may be served, we think the evidence does not show that this corporation had, or intended to have, more than one agent for that purpose. On the contrary, it is shown that the authority

of the first agent had been revoked, and the question is whether the appointment of the first agent, and the filing of the certificate of such appointment required by the statute, was sufficient notice of such revocation. As before stated, we are of the opinion that it was." See, however, *Lesser Cotton Co. v. Yates*, 69 Ark. 396, 63 S. W. 997.

⁴³ *King Lumber Co. v. Omaha Steel Const. Co.*, 93 Neb. 542, 153 N. W. 563. See *New York Continental Jewell Filtration Co. v. Karr*, 31 App. Cas. (D. C.) 459.

prior to its withdrawal.⁴⁴ Where a foreign corporation, which had its manufacturing plant and principal place of business in the state

44 United States. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 L. Ed. 987; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569; Hill v. Empire State-Idaho Mining & Developing Co., 156 Fed. 797; Davis v. Kansas & T. Coal Co., 129 Fed. 149; Collier v. Mutual Reserve Fund Life Ass'n, 119 Fed. 617; McCord Lumber Co. v. Doyle, 97 Fed. 22; Youmans v. Minnesota Title Insurance & Trust Co., 67 Fed. 282.

Indiana. Meixell v. American Motor Car Sales Co., 181 Ind. 153, Ann. Cas. 1916 D 375, 103 N. E. 1071; Brown-Ketcham Iron Works v. George B. Swift Co., 53 Ind. App. 630, 100 N. E. 584, 860.

Iowa. Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa 628, 75 N. W. 635; Brunson v. Nichols, 72 Iowa 763, 34 N. W. 289; Gross v. Nichols, 72 Iowa 239, 33 N. W. 653.

Kentucky. S. B. Reese Lumber Co. v. Licking Coal & Lumber Co., 156 Ky. 723, 161 S. W. 1124; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; Newport News & M. Val. Co. v. McDonald Brick Co.'s Assignee, 109 Ky. 403, 59 S. W. 332; Home Ben. Soc. of New York v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520.

Louisiana. Gounner v. Missouri Valley Bridge & Iron Co., 123 La. 964, 49 So. 657.

Maryland. Boggs v. Inter-American Mining & Smelting Co., 105 Md. 371, 66 Atl. 259.

Massachusetts. Gibson v. Manufacturers' Ins. Co., 144 Mass. 81, 10 N. E. 729.

Minnesota. Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

New Jersey. Groel v. United Elec.

Co. of New Jersey, 69 N. J. Eq. 397, 60 Atl. 822.

New York. Hunter v. Mutual Reserve Fund Life Ins. Co., 97 App. Div. 222, 89 N. Y. Supp. 849; Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. Supp. 438, aff'd 45 Misc. 316, 90 N. Y. Supp. 539, aff'd 104 App. Div. 550, 559, 93 N. Y. Supp. 1052; Gundlin v. Hamburg-American Packet Co., 8 Misc. 291, 28 N. Y. Supp. 572.

North Carolina. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

Texas. Shane v. Mexican International Ry. Co., 8 Tex. Civ. App. 441, 28 S. W. 456.

West Virginia. Smith Ins. Agency v. Hamilton Fire Ins. Co., 69 W. Va. 129, 71 S. E. 194.

Wisconsin. Paulus v. Hart-Parr Co., 136 Wis. 601, 118 N. W. 248.

In Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569, service had within a state upon an agent of a foreign insurance company that had once solicited business in the state, but had ceased to do so, and had withdrawn its soliciting agents before process was served, was held valid to warrant the rendition of a personal judgment; it appearing that the company still had some policyholders residing within the state, who paid their premiums to an agent located without its borders. It was held, in substance, that the corporation was still doing business within the state by collecting premiums from a few policyholders who resided therein, and that service upon one of its agents who came into the state casually to investigate a claim under one of its policies was a good service to warrant a personal judgment, there being a local law authorizing the service.

by which it was created and had a place of business in another state during the time it was engaged in active business, sold its manufacturing plant and business to the plaintiff, gave up its place of business in the state and transferred its headquarters to the office of a banking firm of which its president and vice president were members, where it kept its bank account and the business of settling up its affairs was largely conducted, it was held that the service of process, in an action against such corporation to recover a sum alleged to have been overpaid to the corporation under the contract for such sale, might be made on such officers in the state where the business of liquidating the corporation was conducted.⁴⁵

In some cases, however, a contrary view has been announced by the courts.⁴⁶ After a foreign corporation has withdrawn from the state and is no longer in any way present therein, the courts have no way of obtaining personal jurisdiction over it, unless agencies for service are regarded as continuing with respect to its former presence and consent to be sued,⁴⁷ or it thereafter returns or voluntarily appears.⁴⁸

⁴⁵ *American Locomotive Co. v. Dickson Mfg. Co.*, 117 Fed. 972, following *McCord Lumber Co. v. Doyle*, 97 Fed. 22.

⁴⁶ *Lathrop-Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 150 Fed. 666; *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357; *Friedman v. Empire Life Ins. Co.*, 101 Fed. 535; *Swann v. Mutual Reserve Fund Ass'n*, 100 Fed. 922; *De Castro v. Compagnie Française du Telegraphe de Paris à New York*, 76 Fed. 425; *Racine Lumber & Manufacturing Co. v. G. W. White Lumber Co.*, 190 Ill. App. 102; *Hunter v. Mutual Reserve Life Ins. Co.*, 97 N. Y. App. Div. 222, 89 N. Y. Supp. 849.

Under a statute providing that any nonresident corporation found doing business in the state shall be subject to suit there so far as relates to any transaction had in whole or in part in the state, and that being found doing business in the state shall embrace any transactions with persons, or having any transaction concerning any property situated in this state through any agency whatsoever acting

for it within the state, and also providing that it shall be sufficient to serve the process upon any person if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arose took place, it is held that the statute clearly contemplates that the foreign corporation must be found "doing business" in the state with persons, or concerning property, no matter how slight, at the time of service of process, and after the corporation had ceased to do business in the state service of process upon a former agent of the corporation was insufficient to confer any jurisdiction upon the court over the corporation. *Guthrie v. Connecticut Indemnity Ass'ns*, 101 Tenn. 643, 49 S. W. 829. See also *Cumberland Telephone & Telegraph Co. v. Turner*, 88 Tenn. 265, 12 S. W. 544, and *Connecticut Mut. Life Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145, construing such statute.

⁴⁷ See §§ 2957, 2998, 3002, *supra*.

⁴⁸ See §§ 2957, 2977, 3018, *supra*.

Thus where a corporation had filed its certificate, in pursuance of a statute, naming a representative in the state upon whom process in an action against the corporation might be served, it was held that upon its actual withdrawal from the state and the actual cessation of the agency, service of process upon such representative, who, in fact, held, at the time, no such agency, was not binding upon the corporation in the absence of a statute providing to the contrary.⁴⁹

Under a statute authorizing suit against any nonresident corporation found doing business in the state through any agency whatever acting for it within the state by service of process upon any person found within the county where the suit is brought who represented it at the time the transaction out of which the suit arises took place, a suit will not lie against a foreign corporation which had formally withdrawn from the state and ceased to do business therein, though

⁴⁹ *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357; *Racine Lumber & Manufacturing Co. v. G. W. White Lumber Co.*, 190 Ill. App. 102. See, however, *Michael v. Mutual Ins. Co. of Nashville*, 10 La. Ann. 737.

In *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357, the court said: "Subject to some criticism as to form and definiteness, the affidavits submitted show that, at the time of the alleged service of summons, Church did not, in fact, represent the Pittsburgh Bridge Company. This would dispose of the case, but for this argument: That a foreign corporation, having filed its certificate, in pursuance of the Illinois act naming a representative, continues to be suable in the state, by service on such named representative—irrespective of the corporation's actual withdrawal from the state, or the actual cessation of the agency—until another certificate has been filed setting forth that the person named in the previous certificate is no longer the corporation's representative. It would, perhaps, be competent, by apt legislation, to make this the law; but, in the absence of legislation to that end, we do not feel authorized to hold that a foreign corporation may be held to have been found

in the state, when it, in fact, at the time, was not doing business in the state; or be held to be represented by an agent, who, in fact, held, at the time, no such agency." See also *Buffalo Sandstone Brick Co. v. American Sandstone Brick Mach. Co.*, 141 Fed. 211.

In *De Castro v. Compagnie Française du Telegraphe de Paris à New York*, 76 Fed. 425, *Lacombe, J.*, said: "When it is questioned whether or not a corporation is to be 'found' within a federal district, so that general service of a summons can be effected upon it, and not merely such qualified service as will affect only such property as it may have within the district, the test to be applied is whether or not it is doing business within the district. When it begins to do business here, it comes here; while it continues to do business, it remains; and, when it finally ceases to do business, it departs. * * * It is not easy to see how the mere refusal of the state officers to revoke a designation for purposes of service, made while the corporation was in business here, will operate to prolong indefinitely the original designation long after the corporation may have departed."

service was had upon a former agent who acted for it in the transaction out of which the suit arose, and who remained in the state after his relations with the defendant corporation as agent were dissolved.⁵⁰ A foreign corporation which has ceased to do business in the state, and is there present only in the person of an officer negotiating for adjustment of a controversy arising out of a contract made there is not suable there by service of such officer while so present.⁵¹

Statutes providing that every insurance company shall designate the state insurance commissioner its agent for service of process and that his authority shall continue in force irrevocably as long as any liability of the company remains outstanding in the state have been upheld as valid.⁵² Where a foreign corporation has entered the state

⁵⁰ *Guthrie v. Connecticut Indemnity Ass'n*, 101 Tenn. 643, 49 S. W. 829.

⁵¹ *Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co., Inc.*, 193 Fed. 492.

⁵² *United States. Mutual Reserve Fund Life Ins. Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Hill v. Empire State-Idaho Mining & Developing Co.*, 156 Fed. 797; *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617; *Youmans v. Minnesota Title Insurance & Trust Co.*, 67 Fed. 282.

Alabama. Lewis v. International Ins. Co., — Ala. —, 73 So. 629.

Kentucky. S. B. Reese Lumber Co. v. Licking Coal & Lumber Co., 156 Ky. 723, 161 S. W. 1124; *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; *Home Ben. Soc. of New York v. Muehl*, 22 Ky. L. Rep. 1378, 59 S. W. 520.

Maryland. Boggs v. Inter-American Mining & Smelting Co., 105 Md. 371, 66 Atl. 259.

Minnesota. Magoffin v. Mutual Reserve Fund Life Ass'n, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

New York. Hunter v. Mutual Reserve Life Ins. Co., 184 N. Y. 136, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291, 76 N. E. 1072; *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485,

102 Am. St. Rep. 519, 71 N. E. 10.

North Carolina. Mutual Reserve Fund Life Ass'n v. Scott, 136 N. C. 157, 48 S. E. 581; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 S. E. 955.

Tennessee. D'Arcy v. Connecticut Mut. Life Ins. Co., 108 Tenn. 567, 69 S. W. 768.

West Virginia. Smith Ins. Agency v. Hamilton Fire Ins. Co., 69 W. Va. 129, 71 S. E. 194.

Wisconsin. Paulus v. Hart-Parr Co., 136 Wis. 601, 118 N. W. 248.

When a statute requires a foreign corporation before doing business in the state to appoint the insurance commissioner its agent to accept service of process and provides that "the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this commonwealth," a corporation which has made such appointment cannot revoke such agency as to an outstanding liability by ceasing to do business in the state. *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 123 N. C. 5, 37 S. E. 955.

Under a statute providing that no foreign insurance company shall do

for the transaction of business, and complied with the requirements of

business in the state until it has filed with the state auditor a written stipulation agreeing that any legal process affecting the company served upon him or the agent designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally within the state, and that if such company shall cease to maintain such agent in the state, so designated, such process may thereafter be served on the auditor, but so long as any liability of the stipulating company to any resident of the state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with service at the office of the said company within the state, and that such service according to this stipulation shall be sufficient personal service on the company, it is held that a foreign insurance company which had done business in the state while such statute was in force and had complied with the statute by appointing an agent for the service of process, could not after it ceased to do business in the state revoke such agencies so as to deprive the holder of a policy of insurance written while it was doing business in the state of the right in a suit on his policy to make service upon such agent and bind the company thereby, and that service either upon the auditor or upon such agent so designated was ample and binding upon the defendant to give the court jurisdiction over the company. The court said: "The statute * * * under the circumstances stated, became a part of the policy sued on—as much so as if it were written on its face. Moreover, it was an irrevocable contract, which the company could not avoid until it satisfied the

terms of the statute, which could not be done so long as any liability to any resident of this state, entered into while the company was doing business in the state, continued." *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617.

In *Magoffin v. Mutual Reserve Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115, the court said: "But our statute fixes a limitation to the term of the power, which is 'irrevocable [only] so long as any liability of the company remains outstanding in this state.' The only question, then, in this case is whether this provision of the statute is to be given any effect. The construction given to it and the stipulation by the defendant render both of no practical effect for the protection of resident policyholders who accept their policies and part with their money while the stipulation is in force. Whether the stipulation is a power coupled with an interest within the technical meaning of that term it is unnecessary to inquire; for it is certainly an agreement relating to the remedy which policyholders might have for the enforcement of any liability of the company growing out of its policies issued while the stipulation is in force. The stipulation was not intended for the benefit of the insurance commissioner or of the state, but it was an agreement exacted by the state for the benefit of its citizens, as a condition precedent to the right of the company to do business in this state. It entered into and became a part of every policy which the company issued in the state while it was in force, and the insured acquired an interest therein to the same extent as if it were written into each policy; for the parties are deemed to have contracted with reference to the statute."

such a statute, service of process made upon such state official is sufficient to give the court jurisdiction over the company in an action on a policy of insurance written while the company was doing business in the state, even though at the time of the institution of the action the company had ceased to do business in the state and undertaken to revoke the power of its agents in the state.⁵³ It is also held that notwithstanding the license of the foreign insurance company to do

To like effect is the language of the New York Court of Appeals in *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10, wherein is found the following: "When defendant commenced issuing policies in that state after having complied with the conditions of the statute, its obligations toward its policyholders in that regard were precisely the same as if its promises to the state had been incorporated in the policies, and thereafter, whether the company continued to do business in the state or not, policyholders could commence actions by service of process upon the secretary of state."

Under a Kentucky statute providing that before authority should be granted to a foreign insurance company to do business in the state, it must file with the commissioner of insurance a written consent that service of process upon any agent of the company in the state or upon the state commissioner of insurance in any action brought or pending in the state, shall be a valid service upon the corporation, it was held in the lower federal courts that the authority of the commissioner of insurance ceased when the license of the corporation to do business in the state was revoked, and it had on account of such revocation ceased to do business in the state and had withdrawn its agents from the state. See *Swann v. Mutual Reserve Fund Life Ass'n*, 100 Fed. 922, and *Friedman v. Empire Life Ins. Co.*, 101 Fed. 535. These cases are, how-

ever, overruled by *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed. 987.

It is held that a statute providing that in case any foreign insurance company shall cease to transact business in the state according to the laws thereof, the agents last designated or acting as such for the corporation shall be deemed to continue agents for such corporation, for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in the state, and service of process for such cause of action upon such agents shall be deemed a valid personal service upon such corporation, evidently refers to the agents last acting in the entire state, and not to such as may have been dispensed with in any particular county where the plaintiff happens to reside, provided others remain in the jurisdiction upon whom service can be made. *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 488.

Under such a statute it is held that service must be made upon such last-designated agents of the corporation, and the sheriff takes upon himself the responsibility of determining whether service is actually made upon an officer of the corporation. *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 488. See *Illinois & M. Tel. Co. v. Kennedy*, 24 Ill. 319.

⁵³ *United States. Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.)

business in the state had been revoked by the state, service of process in a suit against the company on a cause of action which arose before such forfeiture and remained an outstanding liability against it when the action was commenced could be made upon such state official, as the right to serve the process on the state official continued so long as any liability remained outstanding in the state.⁵⁴ Under a statute providing that a foreign corporation, having a usual place of business in a state, shall, before transacting business in the state, appoint the commissioner of corporations its attorney upon whom process can be served in any action against it, and that this authority shall continue so long as any liability remains outstanding against the corporation in the state, a nonresident may maintain an action against the corporation after it has ceased to transact business in the state so long as suits brought by citizens of the state against it remain undetermined, or until it has been decided that at the time of the bringing of the action by the nonresident the corporation had no existing liabilities within the state.⁵⁵ The fact that a foreign life insurance company had at one time transacted business in the state under the license issued by the superintendent of insurance, and that it had filed in his office, as required by statute, its "written consent irrevocable" to the institution of suits against it in the courts of the state, and the issuance of summons against it, directed to the superintendent of insurance, does not subject it to suit in this state upon a policy of insurance wholly executed in another state, if previous to the issuance of such policy it had withdrawn or been expelled from the state and had entirely ceased to do business therein.⁵⁶

686; *Collier v. Mutual Reserve Fund Life Ass'n*, 119 Fed. 617.

Kentucky. *Germania Ins. Co. v. Ashby*, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; *Home Ben. Soc. of New York v. Muehl*, 22 Ky. L. Rep. 1378, 59 S. W. 520.

Louisiana. *The Fair v. American Union Fire Ins. Co.*, 135 La. 48, 64 So. 977.

Minnesota. *Magoffin v. Mutual Reserve Fund Life Ass'n*, 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115.

Mississippi. *Pervangher v. Union Casualty & Surety Co.*, 81 Miss. 32, 32 So. 909.

New York. *Klein Bros. & Co. v. Germania Union Fire Ins. Co.*, 66 Misc. 538, 123 N. Y. Supp. 1082.

North Carolina. *Mutual Reserve Fund Life Ass'n v. Scott*, 136 N. C. 157, 48 S. E. 581; *Moore v. Mutual Reserve Fund Life Ass'n*, 129 N. C. 31, 39 S. E. 637; *Biggs v. Mutual Reserve Fund Life Ass'n*, 128 N. C. 5, 37 S. E. 955.

Wisconsin. See *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

⁵⁴ *Paulus v. Hart-Parr Co.*, 136 Wis. 601, 118 N. W. 248.

⁵⁵ *Youmans v. Minnesota Title Insurance & Trust Co.*, 67 Fed. 282.

⁵⁶ *Mutual Reserve Fund Life Ass'n v. Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387, following *People v. Commercial Alliance Life Ins. Co.*, 7 N. Y. App. Div. 297, 40 N. Y. Supp. 269.

Where a corporation has not designated an agent for service of process in actions against it, but, owing to the fact that it has done business in the state, is subject to suit in the state on account of liabilities arising out of such business, its implied consent to be served with process under a statute providing for service upon certain officers or agents in case of the failure of the corporation to make such designation is ended when it ceases to transact business in the state. In such case service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made.⁵⁷

Constructive service of process upon a foreign corporation under a statute providing that a foreign corporation doing business in the state must designate some person residing in the state upon whom the process may be served, and, in default of such designation, service of process may be made upon the secretary of state, is valid only when the corporation is actually doing business in the state at the time of such service, and is not valid when the corporation has withdrawn from the state and ceased to do business in the state.⁵⁸ Under such a statute it is held that where a foreign corporation does business in the state without first complying with the statute, it will be presumed to have assented to service of process upon the state official in a suit brought against it in the state in respect to business transacted by it in that state, but that such assent cannot properly be implied where it affirmatively appears that the business was not transacted in the state, and a judgment in such a suit based on service of process on the state official, without any appearance by or on behalf of the foreign corporation, was not entitled to the faith and credit which, by the constitution, is required to be given to the public acts, records

⁵⁷ *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113.

⁵⁸ *Cady v. Associated Colonies*, 119 Fed. 420. *Morrow, J.*, said: "The state has the right to exclude foreign corporations from doing business in the state, and, where they are not excluded, their right to engage in business within the state depends upon the laws of the state granting the permission. It follows that where the

state provides by law that such a corporation doing business in the state must designate some person residing in the state upon whom the process must be served, and, in default of such designation, service of process may be made upon the secretary of state, such service is valid only when the corporation is actually doing business in the state. It is not valid when the corporation has withdrawn from the state and has ceased to do business within the state."

and judicial procedures of the several states, and was void as wanting in due process of law. Mr. Justice Harlan, speaking for the Supreme Court of the United States, said: "While the highest considerations of public policy demand that an insurance corporation, entering the state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business."⁵⁹

Under a statute providing that when a corporation "has for the transaction of any business an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency," it is held that if the agency for the prosecution of the business out of which the contract in the suit arose was discontinued and the agent's authority revoked, service could not be made upon such agent, though the corporation kept an agent in the same place to transact other business.⁶⁰

Service of process by leaving a copy of the writ at a room in an office building rented by a foreign corporation for the storage of some of its effects is not sufficient to authorize a judgment in personam against the corporation where it has ceased to do business in the state.⁶¹

§ 6047. Service on corporation formed by consolidation of domestic and foreign corporation. A corporation formed by a consolidation of corporations of different states is a domestic corporation of each state by whose laws the consolidation was authorized, and is liable to suit therein, and may be served with process in the same manner as other domestic corporations within such jurisdiction.⁶²

⁵⁹ Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 51 L. Ed. 345.

⁶⁰ Winney v. Sandwich Mfg. Co. (Iowa), 50 N. W. 565, citing Philp v. Covenant Mut. Ben. Ass'n, 62 Iowa 633, 17 N. W. 903; State Ins. Co. v. Granger, 62 Iowa 272, 17 N. W. 504.

⁶¹ Mitchell Min. Co. v. Emig, 35 App. Cas. (D. C.) 527.

⁶² Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; In re St. Paul & N. Pac. Ry. Co., 36 Minn. 85, 30 N. W. 432; Losee v. McCarty, 5 Utah 528, 17 Pac. 452; Baltimore & O. R. Co. v. Gallahue's Admr's, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

See §§ 4823-4825, *supra*.

§ 6048. Service upon corporation created by act of Congress. A corporation created by an act of Congress other than a railroad corporation may be sued in the federal courts of any district wherein it may be found doing business and has an agent upon whom service of process can be made, even though its principal place of business where its seal is kept is in another state. Such a corporation is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution.⁶³ It was enacted in 1915 that national incorporation of a railroad corporation shall not give jurisdiction to federal courts.⁶⁴

§ 6049. Service on receivers of foreign corporation. Under a statute authorizing service of process upon the head officer of a foreign corporation, it is held that a receiver of a corporation cannot be a head officer as such,⁶⁵ though the contrary has been held in another state.⁶⁶ As has been seen heretofore, it is held in some cases that if a receiver has been appointed, and thereafter an action is brought against the corporation, service of process may be had on the person designated by statute to receive process for the corporation, notwithstanding the receivership, and that this is especially true as to receivers appointed in foreign states.⁶⁷ Service of process may be made upon an officer of the corporation, if he is within the class upon whom service of process is authorized to be made, notwithstanding the fact that at the time of the service he may have been appointed receiver of the corporation and was then acting in such capacity.⁶⁸

§ 6050. Service after dissolution. The effect of a dissolution of a foreign corporation upon actions pending against it has been considered elsewhere.⁶⁹

⁶³ Van Dresser v. Oregon R. & Nav. Co., 48 Fed. 202.

See §§ 401, 2961, 2991, *supra*.

⁶⁴ Act of Jan. 28, 1915, c. 22, § 5, provides that no federal court "shall have jurisdiction upon the ground that the party was a railroad incorporated under an Act of Congress." 38 Stat. L. 804. See § 2961, *supra*.

⁶⁵ Youree v. Home Town Mut. Ins. Co. of Warrensburg, Missouri, 180 Mo. 153, 79 S. W. 175.

⁶⁶ Grady v. Richmond & D. R. Co., 116 N. C. 952, 21 S. E. 304. See § 2993, *supra*, where it said that this decision is believed to be either silent on an

essential fact or else unsound in law.

⁶⁷ See § 5295, *supra*. See also § 3003, *supra*. And see Ganebin v. Phelan, 5 Colo. 83, holding that if the return shows a service upon an agent which would have been sufficient if the foreign corporation had been under its ordinary management, it is also sufficient though the corporation was in the hands of receivers when the service was made.

⁶⁸ Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

⁶⁹ See §§ 5613-5617, 5808-5820, *supra*.

The statutes of a state cannot give a court of such state jurisdiction of an action in personam against a foreign corporation after it has been dissolved.⁷⁰ Cases which hold that service upon an official agent of the state brings the corporation into court, even after it has ceased to do business in the state,⁷¹ do not apply to a corporation which has ceased to exist.⁷² It is also held that no valid judgment can be rendered in another jurisdiction against a foreign corporation, in a suit brought after the dissolution of such corporation.⁷³

§ 6051. Service in suits in federal courts. As has been heretofore stated, three conditions must concur or coexist in order to give the federal courts jurisdiction in personam over a corporation created in another state: (1) It must appear as a matter of fact that the corporation is carrying on its business in the state where it is served with process; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition express or implied, of doing business in the state.⁷⁴ Under the federal decisions two things must concur or coexist in order to subject a foreign corporation to suit in a state in general: (1) The

⁷⁰ Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 102 Am. t. Rep. 519, 71 N. E. 10, aff'd 200 S. 612, 50 L. Ed. 620.

⁷¹ Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850, citing Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 74; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, and Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34, 42 N. E. 115.

See § 6046, supra.

⁷² Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850. See also § 5810, 5811, supra.

As to service of process after the dissolution of a corporation, see § 5608, supra.

⁷³ Remington & Sons v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292. See § 5811, supra. See also § 5611, supra.

⁷⁴ Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 618, 43 L. Ed. 569; United States v. American

Bell Tel. Co., 29 Fed. 17, quoted with approval in Buffalo Glass Co. v. Manufacturer's Glass Co., 142 Fed. 273; Union Associated Press v. Times Printing Co., 83 Fed. 822. See also New England Mut. Life Ins. Co. v. Woodworth, 111 U. S. 138, 28 L. Ed. 379; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843; Michigan Aluminum Foundry Co. v. Aluminum Castings Co., 190 Fed. 879; Boston Elec. Co. v. Electric Gas & Lighting Co., 23 Fed. 838, 839; Merchants' Mfg. Co. v. Grand Trunk Ry. Co., 13 Fed. 358. See § 2990, supra.

corporation must be carrying on its business in the state where it is served with process; and (2) the process must be served upon some agent or officer representing it in such state in the doing of such business or appointed by it to receive service of such process.⁷⁵

By virtue of the Conformity Act the service "as near as may be" follows the state practice, an exception being that the service is to be made by the marshal.⁷⁶ Generally the state laws providing for the service of process in the state courts in actions at law furnish the rules of procedure in such cases in a federal court held within such state, so that whatever would be lawful service of process to bring a party into court, if the action were in a court of competent jurisdiction under the state government, is lawful and sufficient for the purpose in actions commenced in such federal court.⁷⁷ A service in an action at law on a foreign corporation in conformity to a state statute is good in the federal courts, unless the notice thus provided is not adequate according to the rules of due process of law.⁷⁸ The statutes of the states creating a constructive presence within the jurisdiction for process service, such as acts providing for service upon the registered agents of foreign corporations, are held to include service of process by the courts of the

⁷⁵ *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.*, 190 Fed. 879. See also *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 618, 43 L. Ed. 569; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964.

"A long line of decisions has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof." *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915 B 77.

⁷⁶ U. S. Rev. St., § 914. *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843. And see *Foster*, Fed. Prac. (5th Ed.), § 453 et seq.

See § 2990, *supra*.

⁷⁷ *McCullough v. United Grocers' Corporation*, 247 Fed. 880; *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843; *Van Dresser v. Oregon Ry. & Nav. Co.*, 48 Fed. 202.

"Service of summons should be made here in conformity to the state law, and what is a good service under the state statute will be good in federal courts, provided only that the notice given by said summons is adequate, according to the rules of due process of law." *McCullough v. United Grocers' Corporation*, 247 Fed. 880. See also *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

"The cause of action having accrued in New York by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. *Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Myer*, 197 U. S. 407, 49 L. Ed. 810." *St. Louis S. W. R. Co. v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915 B 77.

See, generally, *Foster*, Fed. Prac. (5th Ed.), § 455.

⁷⁸ *Beach v. Kerr Turbine Co.*, 243 Fed. 706.

United States.⁷⁹ In equity and admiralty the Conformity Act does not apply but the service is made on the same persons as in actions at law.⁸⁰ In practice, however, it has developed that many deviations from state practice have been required by the necessities of practicality.⁸¹ While service of a subpoena from a federal court in equity upon a nonresident corporation cannot be controlled by state statutes, yet, when there is no applicable provision of a federal statute, the procedure of the state statutes may be followed, if deemed reasonable and adapted to the purpose.⁸² In patent infringement cases the ordinary service is permissible if the corporation is an inhabitant of the district or alternative service may be on an agent, and the latter is the only mode if the corporation is not an inhabitant.⁸³

While this may not be necessary in the local courts, in the federal courts, which are courts of limited jurisdiction, it is necessary that every jurisdictional fact must appear upon the record.⁸⁴ The federal

⁷⁹ *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

⁸⁰ See U. S. Rev. St., § 913, and New Equity Rule 7, and Admiralty Rules No 2. See also *Lemon v. Imperial Window Glass Co.*, 199 Fed. 927; § 2990, *supra*.

Although the state laws do not control process in equity in federal courts (U. S. Rev. St., § 914), yet the state law prescribing who may be served to bring a domestic corporation into court will apply as inherent in the law of corporate creation and existence. *Atlas Glass Co. v. Ball Bros. Glass Mfg. Co.*, 87 Fed. 418, appeal dismissed 93 Fed. 987 (mem. dec.).

⁸¹ See 1 Foster, Fed. Prac. (5th Ed.), § 453 et seq. See also § 2990, *supra*.

⁸² *Toledo Computing Scale Co. v. Computing Scale Co.*, 142 Fed. 919; *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843.

⁸³ Judicial Code, § 48; *National Elec. Signaling Co. v. Telefunken Wireless Tel. Co.*, 194 Fed. 893; *Weller v. Pennsylvania R. Co.*, 113 Fed. 502; *United States Gramophone Co. v. Columbia Phonograph Co.*, 106 Fed. 220.

It is held that the federal statute providing for service upon nonresident defendants where the suit is commenced "to enforce any legal or equitable lien upon or claim to, or remove any encumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought" does not authorize service of process upon a foreign corporation in a suit against it to determine the title to a patent right, even though the letters patent are in the possession of the complainant. *Non-Magnetic Watch Co. v. Association Horlogère Suisse of Geneva*, 44 Fed. 6. *Lacombe, J.*, said: "The various cases which were cited by the complainant's counsel interpreting this section are concerned either with real property, or with such tangible personal property as was susceptible to actual possession. I cannot satisfy myself that the section covers or was intended to cover such incorporeal and intangible property as a patent-right, possession of which must of necessity be ideal, not actual, and which cannot be seized or sold under execution."

⁸⁴ *Jackson v. Delaware River Amusement Co.*, 131 Fed. 134, citing

courts determine for themselves the fact of the presence of the defendant within the jurisdiction, and in determining it they may or may not follow the rulings of the state courts.⁸⁵ "Howsoever broad the rule in a state may be, the rule that service of process to be valid must be on an agent who can be said fairly to represent the foreign corporation in the state may be deemed settled in the courts of the United States."⁸⁶ A corporation incorporated for and engaged in the business of constructing and erecting oil tanks, which when practicable were constructed at its main works in the state of its incorporation, and when to be erected in another state were shipped in charge of its employees, who erected them in the place of their location, the man in charge there, employing such labor as might be required, was held by a federal court to be "doing business" in the federal district in which it erected such a tank so as to be subject to suit by a person injured in the erecting of the tank, notwithstanding it had not registered as required by the laws of the state in which the tank was erected, and the foreman in charge of the erection of the tank might be served with process in action against the corporation for such injuries as the agent of the corporation under the statutes of the state authorizing service upon the agent of a foreign corporation doing business in the state who represents and acts for them in the business which they are doing in the state.⁸⁷ When the fact

St. Clair v. Cox, 106 U. S. 350, 27 L. Ed. 222; Earle v. Chesapeake & O. Ry. Co., 127 Fed. 235; Scott v. Stockholders' Oil Co., 120 Fed. 698, aff'd 122 Fed. 835.

⁸⁵ Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843.

⁸⁶ Michigan Aluminum Foundry Co. v. Aluminum Castings Co., 190 Fed. 879, holding that service on a local manager residing in the county, having charge of the local office and described on the stationery and office door as manager, and who testified that he was practically a general agent for the corporation's business in the state, was service on an agent fairly representing the corporation, and also holding that service on the head of an independent department of the corporation who was frequently in the state and had the highest authority of those employees coming fre-

quently into the state was sufficient. See §§ 6035-6042, *supra*.

⁸⁷ Nickerson v. Warren City Tank & Boiler Co., 223 Fed. 843. The court said: "The man upon whom the service was made was such agent, and the service in matter of fact and substance a real service upon the corporation. The only question which can arise is as to the formal correctness of the return. This is under the facts a mere choice of verbiage. The return describes the person served as 'foreman.' Service upon one who was a mere workman employee, charged with no representative responsibilities, and having neither authority nor sense of obligation to act for his employer, would not be service upon the principal in fact, and would be a mode of service fraught with too much danger of injustice to sanction. Where, however, the person served is in re-

of the presence of the defendant is not in dispute, and only the mode or manner of the service is in question, a service in accordance with the requirements of the state statutes is a good service.⁸⁸

§ 6052. Effect of construction by state court of statute relating to service. The construction placed on a statute relating to service of process upon corporations by the highest tribunal of the state by which the statute was enacted is binding upon the federal courts, if the service obtained in pursuance of the act constitutes due process of law, or in other words, does not violate the Federal Constitution.⁸⁹ Thus where the highest court of the state has held that a statute providing that "a summons against a corporation" might be served upon certain officers applied to both foreign and domestic corporations, a federal court sitting in such state will follow such construction of the statute.⁹⁰

§ 6053. Return. A return of a writ of summons is the answer of the officer indorsed on the writ certifying to the court the fact and manner of service.⁹¹

sponsible charge of the work which an unregistered foreign corporation is doing, and is such a person as that the corporation has no one to act for and represent it, unless such person is its agent and representative, it is not going further than the ends of justice require to hold that service upon the one clothed with such powers and authority is service upon the corporation. Such a case the facts show the present case to be."

⁸⁸ *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843, 844.

⁸⁹ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338, citing *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657; *McCord Lumber Co. v. Doyle*, 97 Fed. 22.

In *McCord Lumber Co. v. Doyle*, 97 Fed. 22, the court said: "It is not always true, however, that a mode of service which is prescribed by the statutes of a state, and is there held sufficient to warrant the rendition of a personal judgment, will also be held

to be a good service by the courts of other states or by the federal courts. The fundamental principle that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceedings as is fair and reasonable, must not be violated. And the federal courts, in common with the courts of other states, must be permitted to judge for themselves, when the question is properly raised in an action pending before them, whether the mode of service that has been prescribed by the laws of a particular state satisfies these requirements. With these limitations, it is the established rule that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, will obtain similar recognition in the federal courts."

⁹⁰ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338.

⁹¹ *Arkansas. Wilson v. Young*, 58

The return should show affirmatively the facts required to constitute a valid service, and where it does not do so, but states conclusions of law and fact apart from what was done, no presumptions are to be indulged in favor of such a return, so as to give the court jurisdiction over a foreign corporation.⁹² And where a statute provides that the service of a summons upon a foreign corporation shall be served upon a certain kind of an agent or on a particular officer or officers, the return must show that the service was made upon an agent of the class, or an officer, designated by the statute.⁹³ Thus under a statute providing

Ark. 593, 25 S. W. 870.

Georgia. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

Illinois. Nelson v. Cook, 19 Ill. 440.

Iowa. Aultman v. McGrady, 58 Iowa 118, 12 N. W. 233.

Mississippi. Beall v. Shattuck, 53 Miss. 358.

Missouri. Horton v. Kansas City, Ft. S. & G. R. Co., 26 Mo. App. 349.

Nebraska. Graves v. MacFarland, 58 Neb. 802, 79 N. W. 707.

New York. Iselin v. Henlein, 16 Abb. N. Cas. 73.

Tennessee. Hutton v. Campbell, 10 Lea 170.

⁹² United States. Allen v. Yellowstone Park Transp. Co., 154 Fed. 504; Jackson v. Delaware River Amusement Co., 131 Fed. 134; United States v. American Bell Tel. Co., 29 Fed. 17, citing Alexandria v. Fairfax, 95 U. S. 780, 24 L. Ed. 583, and Grace v. American Cent. Ins. Co., 109 U. S. 283, 27 L. Ed. 932.

Arkansas. Southern Building & Loan Ass'n v. Hallum, 59 Ark. 583, 28 S. W. 420.

Missouri. Newcomb v. New York Cent. & H. River R. Co., 182 Mo. 687, 81 S. W. 1069; Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321; Gamasche v. Smythe, 60 Mo. App. 161.

Oregon. Knapp v. Wallace, 50 Ore. 348, 126 Am. St. Rep. 742, 92 Pac. 1054.

West Virginia. Adkins v. Globe

Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

⁹³ United States. New River Mineral Co. v. Seeley, 120 Fed. 193; Sobrio v. Manhattan Life Ins. Co., 72 Fed. 566; Farmer v. Nat. Life Ass'n of Hartford, Connecticut, 50 Fed. 829; United States v. American Bell Tel. Co., 29 Fed. 17; Kiufek v. Merchants' Dispatch Transp. Co., -3 McCrary 547, 11 Fed. 282.

Arkansas. Union Guaranty & Trust Co. v. Craddock, 59 Ark. 593, 28 S. W. 424; Southern Building & Loan Ass'n v. Hallum, 59 Ark. 583, 28 S. W. 420.

California. Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270.

Colorado. Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623; Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Maryland. Wagner v. Shank, 59 Md. 313.

Michigan. Toledo Ice Co. v. Munger, 124 Mich. 4, 82 N. W. 663.

Mississippi. Continental Ins. Co. v. Mansfield, 45 Miss. 311.

Missouri. Newcomb v. New York Cent. & H. River R. Co., 182 Mo. 687, 81 S. W. 1069; Gamasche v. Smythe, 60 Mo. App. 161.

Nevada. Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597; Lonkey v. Keyes Silver Min. Co., 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57.

New Jersey. Roake v. Pennsylvania

that before any foreign corporation shall begin to carry on business in the state, it shall, by its certificate under the hand of the president and seal of the corporation designate an agent, who shall be a citizen of the state, upon whom service of process may be made, and that service upon such an agent shall be sufficient to give jurisdiction over such corporation in any of the courts of the state, it is held that a return of summons in an action against a foreign corporation which shows that it was made on an agent of the defendant out of the county in which the action was brought and does not show that the person served had been designated as such agent for the service of process, was not a return upon which a judgment against the corporation could be based.⁹⁴ A return of service of a summons in an action against a foreign insurance company or other corporation upon an attorney appointed by it to accept service of process must show that he is the attorney so appointed to accept service of process.⁹⁵ Where it is

R. Co., 70 N. J. L. 494, 57 Atl. 160.

Texas. National Cereal Co. v. Earnest (Tex. Civ. App.), 87 S. W. 734.

West Virginia. Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

⁹⁴ Southern Building & Loan Ass'n v. Hallum, 59 Ark. 583, 28 S. W. 420.

For facts held not sufficient to warrant the court in refusing the defendant's motion to set aside the service of summons upon a foreign corporation on the ground that the person on whom it was served was neither an officer nor an agent of the corporation, see Hess v. Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774.

⁹⁵ Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

Thus a return showing a delivery to "Alf. Paul, attorney in fact and of record for said Globe Fire Ins. Company," is bad for not designating for what purpose he is attorney, and judgment therein is void. Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194. On rehearing, the court said: "The return must state all facts to make it good, and where it departs from the statute, everything is in-

ferred against it which such departure warrants. Bank v. Suman, 79 Mo. 531, 97 Am. Dec. 280, note; 22 Am. & Eng. Enc. Law, 183. Hence, in this case we can fairly infer that Paul may have been an attorney in fact for other purposes than to accept service. Counsel cite Webster Wagon Co. v. Peterson, 27 W. Va. 314, where the service was on the 'lawful attorney' of a foreign insurance company. The court held it prima facie good to prevent a judgment being regarded null and void, but did not say that, if objected to before the judgment became final, or by motion to set it aside for want of legal service, it would be good. Here it is on motion to set aside the judgment before it became final. And observe in that case the service was on a 'lawful attorney,' which imported perhaps one appointed by law, like 'state agent,' in Stone v. Insurance Co., 78 Mo. 655, while 'agent,' was not good in Gales v. Tuslen, 89 Mo. 19, 14 S. W. 827; but in this case it is 'attorney in fact and of record,'—not saying 'lawful,' nor importing one appointed under the statute. The words 'of record' do not help, because no law required the ap-

provided by statute that where the defendant is a foreign corporation, service may be made by delivering a copy of the writ and petition to any officer or agent of such corporation in charge of any office or place of business of the defendant, a return of the service which fails to state that the alleged agent of the defendant, upon whom service was made, was an agent in charge of an office or place of business of the defendant, is defective.⁹⁶ But under a statute providing that service may be made upon the agent of a foreign corporation, it is held that a return stating that service was made upon the president or vice president without specifying that the officer had served either of these officials in the capacity of agent was sufficient.⁹⁷ The return may be impeached by showing that the person upon whom service of the writ was made was not the agent of the foreign corporation.⁹⁸

The return of service on an agent of a foreign corporation need not show all the facts set out in the statute which authorizes and provides for such service, but it is sufficient if they are shown from the record.⁹⁹

pointment to be recorded. The service is simply and only on an attorney in fact, and it thus plainly falls under the law above that, unless the agency is defined, the service is bad."

⁹⁶ *Kiufek v. Merchants' Dispatch Transp. Co.*, 3 McCrary 547, 11 Fed. 282.

Under a statute providing that if the defendant is a foreign corporation, process may be served upon the agent in charge of its principal office in the state, or upon any officer either personally or by leaving a copy at his usual place of abode, or by leaving a copy at the office, depot, or usual place of business of such foreign corporation within the county, with any person in charge thereof, it is held that a return which states that the summons was served by reading the same to a certain person, "resident agent" of the defendant foreign corporation, and delivering a copy to him at a certain place in the state, was not sufficient to give the court jurisdiction in an action against the corporation. *Roake v. Pennsylvania R. Co.*, 70 N. J. L. 494, 57 Atl. 160.

⁹⁷ *Venner v. Denver Union Water*

Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623, in which case it was said: "The person sustaining either of these relations to a corporation is an acknowledged officer thereof. It would be difficult to define, with any degree of certainty, what the ordinary duties of a vice president may be. Generally he acts as president in the absence of the latter from duty, exercising such authority with respect to the affairs of the corporation as the president might himself, were he present. Certainly he is an agent of the corporation of which he is vice president, and so is the president, and it is not necessary that the officer serving process should specify in his return that he had served either of these officials in the capacity of agent, when it appears that service was upon a specified official of the corporation, which carries with it the information by implication that service was upon an agent thereof."

⁹⁸ *Pecos & N. T. R. Co. v. Cox*, 195 Tex. 40, 143 S. W. 606.

⁹⁹ *Nelson Morris & Co. v. E. K. Rehkopf & Sons*, 25 Ky. L. Rep. 352, 75 S. W. 203; *Carpenter v. Laswell*, 23

By some authorities it is held that a return of service of process is insufficient to authorize the court to entertain jurisdiction, where it does not appear by the return or by the record that the corporation defendant was engaged in business within the state, or that the persons served were transacting business for it within the state.¹ Thus under a statute providing that where a foreign corporation has an office or is doing business in the state service of process shall be made by delivering a copy of the writ and petition to any officer or agent of such corporation in charge of any office or place of business, or if it have no office or place of business, then service may be made upon any officer, agent or employee in any county, and where such service is had in conformity with such provisions, it shall be deemed personal service against such corporation and will authorize the rendition of a general judgment against it, it is held that it is the obvious meaning of the statute that if the foreign corporation has an office or place of business in the state, service of the writ must be made by delivering to the officer or agent of the company in charge of such office a copy of the writ and petition, but, if the foreign corporation has no office or place of business in the state, that the writ may be served by delivering a copy of the same with a copy of the petition, to any officer, agent or employee found in the state, and that a return to be good under the second clause of the statute should affirmatively state that the defendant corporation had no office or place of business in the state, and that, failing to do so, it was insufficient under the

Ky. L. Rep. 686, 63 S. W. 609; *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 49 Pac. 876; *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855, rev'd on other grounds in 99 Tex. 87, 87 S. W. 660.

Under a statute providing that in an action against a foreign corporation, engaged in business in the state, the summons may be served on the manager, or agent of, or person in charge of such business in the state, in the county where the business is carried on, or in the county where the cause of action occurred, it is held that the sheriff is not required to know and to show by his return all the facts set out in the statute, but if these facts are shown by the record, it is sufficient. *Nelson Morris & Co. v. E. K. Rehkopf & Sons*, 25 Ky. L. Rep. 352, 75 S. W. 203, holding that

a personal judgment may properly be rendered under such provision.

¹ *Central Grain & Stock Exchange of Hammond v. Board of Trade, City of Chicago*, 125 Fed. 463; *Nathan v. Planters' Cotton Oil Co.*, 187 Mo. App. 560, 174 S. W. 126.

It is held in Florida that failure to state in the sheriff's return as to the service of the writ, that the defendant foreign corporation was doing business in the state, or that its president, on whom service was attempted to be made, resided in the state, or that he was there in the state on the business of the corporation, is not ground for quashing the return. *Putnam Lumber Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193; *Ellis-Young Co. v. Putnam Lumber Co.*, 50 Fla. 217, 39 So. 198.

statute.² And under a statute providing that where the defendant is a foreign corporation, having an office or doing business in the state, the summons may be executed by delivering a copy of the writ and petition to any officer or agent in charge of any office or place of business, or, if it has no office or place of business, then to any officer, agent or employee in any county where such service may be obtained, it is held that the return is not sufficient which shows a service on an agent not in the defendant's place of business, unless it states that the defendant had no office or place of business at which the writ could be served.³ Where the petition describes the defendant as a foreign corporation, it is not necessary for the sheriff to state in his return that the defendant is a foreign corporation.⁴

Where the invalidity, irregularity or defect in the service of the writ in an action against a foreign corporation appears upon the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court; but where the objection does not appear upon the record, the better practice is to raise it by a plea in abatement on which an issue may be regularly taken and tried.⁵ By the weight of authority, and it

² *Walter A. Zelincker Supply Co. v. Mississippi Cotton Co.*, 103 Mo. App. 94, 77 S. W. 321.

It should be alleged and shown that the foreign corporation had an office or place of business in the state. *Walter A. Zelincker Supply Co. v. Mississippi Cotton Co.*, 103 Mo. App. 94, 77 S. W. 321; *Banister v. Weber Gas & Gasoline Engine Co.*, 82 Mo. App. 528; *Middough v. St. Joseph & D. C. R. Co.*, 51 Mo. App. 528.

³ *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069.

⁴ *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069.

⁵ *United States v. American Bell Tel. Co.*, 29 Fed. 17, 28; *Rubel v. Beaver Falls Cutlery Co.*, 22 Fed. 282; *Halsey v. Hurd*, 6 McLean 14, Fed. Cas. No. 5966. See *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573; *Hilton & Allen v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899; *Lane Bros. & Co.*

v. Bauserman, 103 Va. 146, 106 Am. St. Rep. 872, 48 S. E. 857.

See §§ 3014, 3069, *supra*, where the practice in this regard is discussed.

In *United States v. American Bell Tel. Co.*, 29 Fed. 28, the court said: "Where the invalidity, irregularity, or defect in the service of the writ appears upon the face of the return, a motion to quash the service or abate the writ is the proper mode of bringing the matter to the attention of the court; but where the objection does not appear upon the face of the papers, the better rule of practice, where it is sought to question or dispute the facts stated therein, is to do so by plea in abatement, on which an issue may be regularly taken and tried. *Halsey v. Hurd*, 6 McLean, 14; *Rubel v. Beaver Falls Cutlery Co.*, 22 Fed. Rep. 282, 283. It is not denied that objections to the regularity or validity of the service, not appearing on the face of the return, are sometimes taken by motion to dismiss or

would seem in accordance with the sounder reasoning, where the sheriff's return of process is sufficient on its face, and its truthfulness is admitted, matters dehors such return must be raised by plea.⁶

set aside the service. Thus in *Harkness v. Hyde*, 98 U. S. 476, the illegality of the service, which did not appear upon the face of the return, was presented by motion to dismiss the suit, which was treated by the court as a motion to set aside the service, and was sustained. But the general rule of practice is to raise such issues of fact by plea in abatement; and in this case, as the defendant's motion and plea in abatement present identically the same issue, and on the same state of facts, so far as relates to the truth of the return, it would seem to be the better practice, and most correct course, to have that question considered and determined on the plea rather than the motion, which is an application for summary relief based upon ex parte affidavits. The court will accordingly overrule so much of defendant's motion as seeks to dispute or controvert the truth of the facts stated in the marshal's return, but will leave said motion to stand so far as it raises the question of the legal sufficiency of the service on the face of the return, and to be considered with the plea in abatement." See also *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573.

The Court of Appeals of Virginia said: "Where the matter on which the defendant relies to abate the suit is a fact not appearing by the record or the return of the officer, it must be pleaded in abatement, so as to give the other party an opportunity to traverse and try it. But where all the facts upon which the claim to have the process abated is founded appear by the record, including the return of the officer, of which the court will take notice without plea, there the action may be dismissed on motion.

In that case the motion is not intended to state new facts, but merely to bring to the attention of the court, and also to furnish notice to the other party, of those facts appearing on the record and return, which of themselves are sufficient to show that the action cannot be properly proceeded in for want of due service or other defect in the proceedings." *Hilton & Allen v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899.

In *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 106 Am. St. Rep. 872, 48 S. E. 857, the court said: "It is well settled that, if process be illegally issued or executed, the validity of such process or return can be raised by a motion to quash, as well as by a plea in abatement. See *Garrard v. Henry*, 6 Rand. 112, 116; *Pulliam v. Aler*, 15 Gratt. 54, 62; *Warren v. Saunders*, 27 Gratt. 259, 268; *Raub v. Otterback*, 89 Va. 645, 649; *N. & W. Ry. Co. v. Carter*, 91 Va. 587, 1 Rob. Pr. (Old Ed.) 162; 4 Minn. Inst. (1st Ed.) 532. But, if such motion be not made and disposed of before appearing to the action, or before taking or consenting to a continuance, the party is held to have waived all defects in the process and service thereof. *Wynn v. Wyatt's Adm'x*, 11 Leigh, 584, 590-595; *Pulliam v. Aler*, supra; *Harvey v. Skipwith*, 16 Gratt. 410, 414; *Petty v. Frick*, 86 Va. 501, 503; *New River Min. Co. v. Painter*, 100 Va. 507."

⁶ **Florida.** *Putnam Lumber Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193.

Illinois. *Greer v. Young*, 120 Ill. 184, 11 N. E. 167.

Maine. *Perry v. New Brunswick Ry. Co.*, 71 Me. 359.

Missouri. *Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co.*,

In some cases it is held that objections to the regularity or validity of the service, not appearing on the face of the return, may be taken by motion to dismiss or set aside the service supported by affidavits.⁷

103 Mo. App. 94, 77 S. W. 321.

New Jersey. Camden Rolling Mill Co. v. Swede Iron Co., 32 N. J. L. 15.

Texas. Youngblood v. Strahorn-Hutton-Evans Commission Co. (Tex. Civ. App.), 40 S. W. 648.

See §§ 3014, 3069, *supra*.

Where it is provided that suit may be brought against a foreign corporation on a cause of action arising in the state, the defense that the cause of action did not arise within the state should be fairly raised by a plea, and not by a motion to quash the declaration, which is not the proper remedy. *Maxwell v. Speed*, 60 Mich. 36, 26 N. W. 824.

It is held in Michigan that a motion to quash a summons on the ground that the defendant corporation was not doing business in the state and that the cause of action did not arise therein, should not be heard on affidavits in support thereof and in opposition thereto, but such motion should be overruled so as to permit issue to be joined on the questions and a trial had on such issue. *Sherrill v. Grand Trunk Ry. Co. of Canada*, 161 Mich. 495, 126 N. W. 830.

Under former United States Equity Rule 31, providing that no demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact, it was held that a plea in abatement filed to set aside service of process against the corporation on the ground that the person served was not its officer or agent, was not sufficiently verified when the affidavit was made by such person, for assuming the

plea to be true, be disclosed that he had no authority to make the affidavit on behalf of the corporation, which could speak only by its officers or agents. *Scott v. Stockholders' Oil Co.*, 129 Fed. 615.

⁷ *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Benton v. McIntosh*, 96 Fed. 132; *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398; *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 70 Fed. 276; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 54 Fed. 420. See *United States v. American Bell Tel. Co.*, 29 Fed. 17, 28.

In *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, the court said: "There can be no doubt that the rule upon this question of practice prevailing in the Illinois state courts is contrary to the general rule on the subject in this country, as well as in England. There is no more reason for requiring a plea in abatement and a jury trial to test the question of a sufficient service of a summons than there would be to require the same proceeding, including a jury trial, in all cases where now a motion is held to be the proper remedy. The constitutional right to a jury trial obtains whenever there is any question at issue involving the life, liberty, or property of the citizen. But a motion to quash a service of summons, or any other process or order, for insufficiency in the service, involves no such substantial right. The setting aside of service does not affect the writ or the status of the action in court. Another service can be made, and the action proceed. If the original process were exhausted, a new summons could be issued. If the objection were to the writ itself, a plea in abatement would be the proper remedy, the office of which is

The practice of setting aside service on motion or on rule to show cause why the service should not be set aside has been adopted by the federal courts in many of the districts, even where the local practice requires a plea in abatement.⁸

to give the plaintiff a better writ. 1 Chit. Pl. 446-457. But here the plaintiff still has his writ. The order only sets aside the service, as being unwarranted and insufficient in law. No substantial right is affected by the decision. There are many matters pending in the progress of a case which are daily determined upon motion that are much more important in affecting substantial rights than a motion to set aside an irregular service of process. Take, for instance, the motion for a new trial upon newly-discovered evidence after the plaintiff has recovered a substantial verdict. The court, in its discretion, may set aside the verdict upon a motion. Whether the plaintiff will ever be able to obtain another is uncertain, and yet no one would think of objecting to trying such a question before the court upon motion supported and opposed by affidavits. The practice in the United States Circuit Court for this circuit was fairly well established by precedent when this action was begun. So that if the defendant had resorted to a plea in abatement, instead of making a motion, he would have subjected himself to the criticism that he was departing from the usual practice adopted in such cases. In *Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, supra, a similar motion was made and heard before Judge Blodgett at the circuit without question as to the propriety of the practice, and an order made quashing the service. Judge Blodgett delivered an opinion, holding the service insufficient, which was affirmed by this court, where no question was made as to the proper practice being by motion. In *American*

Cereal Co. v. Eli Pettijohn Cereal Co., 70 Fed. 276, the same practice was adopted and the service set aside upon motion; Judge Showalter delivering an opinion justifying the practice, and giving good and sufficient reason for it, as follows: 'The determining consideration is that the matter at issue, however it may result, will not end the suit. If found against the defendant, the defendant is in court and must plead; if in favor of the defendant, the return of the writ is vacated or quashed, and the suit remains pending; whereas a plea, either in abatement or in bar, if made out by proofs, puts an end to the proceeding. The view that a motion to be determined upon affidavits is the proper practice in such cases is sustained by English decisions,' citing *Hemp v. Warren*, 2 Dowl. (N. S.) 758; *Preston v. Lamont*, 1 Exch. Div. 361. In the last of the above-named English cases, *Amphlett, B.*, in a concurring opinion, gives the reason for having the question of service determined summarily upon motion, instead of by plea, as follows: 'The decision of the judge at chambers can be contested on appeal, and, if necessary, in the house of lords. There is convenience in this, because it is a speedy and inexpensive mode of determining that question before any expense is incurred upon the merits of the action, whereas, if the question may be raised by plea, all the expenses of the action may be thrown away. * * * Convenience and justice, I think, require that this question should not be the subject of a plea.' "

⁸ *Jackson v. Delaware River Amusement Co.*, 131 Fed. 134; *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398. See

It has been suggested that, in analogy to the practice under a plea in abatement of giving the plaintiff a better writ, the defendant on a motion to quash based upon the ground that the service was not made upon a person authorized to receive service of process for the corporation, the defendant should state in his affidavits in support of such motion on whom the summons may be properly served, or if there be no such person in the jurisdiction, should state that fact, but the contrary doctrine has been laid down.⁹ Under a statute providing that the writ of summons in attachment against a foreign corporation must be served upon the defendant's known agent or attorney or, for

Park Bros. & Co. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334.

⁹ Wall v. Chesapeake & O. Ry. Co., 95 Fed. 398. The court said: "No authority is cited for such a rule, and we have searched in vain for a precedent to warrant it. Under our present jurisdiction act, this suit, if brought in the federal court, might be brought either in the district where the plaintiff resides, or the one where the defendant resides. The plaintiff resided in Chicago. The defendant resided in Virginia, having its principal offices at Richmond, in that state. In bringing her action in Cook county, the plaintiff took her chances of being able to get service in that county. Plaintiff's counsel would know without being advised either by plea or affidavit that plaintiff could commence her suit in Virginia, either in the federal or state court, and obtain proper service of summons, or in all probability in the local court at Cincinnati, where the supposed cause of action arose. But there could hardly be any presumption that the defendant would have an office or offices a thousand miles away from its residence and where it operated its road. It seems, therefore, that there could be no obligation on the defendant's part to give the plaintiff a better service. There is no suggestion in any of the adjudicated cases that this doctrine has any application to a mo-

tion to set aside service. It only applies to a plea in abatement where the objection is to the writ itself. The only better service that she could have would be obtained by discontinuing her action, and bringing suit elsewhere, in some state or place where the defendant was doing business. The plaintiff is here in the rather anomalous attitude of seeking to reverse a judgment to which she consented in open court in the court below, and which would not have been rendered but by such consent. The record shows that she stated in open court that no further efforts would be made to obtain service upon the defendant in that court, and consented that the action be dismissed for want of prosecution." See, however, dissenting opinion of Woods, J.

Where a foreign corporation defendant moved to set aside the service of process upon it for the reason that the person served was not the agent of the corporation, and the court ordered the defendant to so amend its affidavits as to disclose an agent upon whom service of process could be made, and entered judgment by default against it upon its failure to comply with such order, it was held that the action of the court in requiring the defendant to make such disclosure was erroneous. Cincinnati Times-Star Co. v. France, 22 Ky. L. Rep. 1666, 61 S. W. 18.

want thereof, at the place where the goods and chattels were attached, it was held that where a plea in abatement did not allege that the person with whom the copy of the writ was left as required by statute was not such agent or attorney nor that the copy was not left with him at the place of attachment was insufficient.¹⁰

Service of process will not be set aside where the facts submitted show that there was purely a technical and not jurisdictional defect in the service of the record, and it does not appear on the face of the return.¹¹

Where the validity of the service of process upon a foreign corporation is objected to on the ground that the authority of the agent to receive process against the corporation had been terminated prior to the time of the service, the burden is upon the corporation to establish such fact.¹² The defendant, upon its motion to set aside the service of process upon it, must negative the existence of facts which would be sufficient to confer jurisdiction against it.¹³

¹⁰ *Shampeau v. Connecticut River Lumber Co.*, 37 Fed. 771.

¹¹ *Union Pac. Ry. Co. v. Novak*, 61 Fed. 573.

¹² *Hess v. Adamant Mfg. Co.*, 66 Minn. 79, 68 S. W. 774.

¹³ *Scherer v. Ground Hog Mining & Milling Co.*, 28 Civ. Proc. (N. Y.) 231, 55 N. Y. Supp. 743, aff'd 36 N. Y. App. Div. 633, 55 N. Y. Supp. 1148. See also *Wamsley v. H. L. Horton & Co.*, 68 Hun (N. Y.) 549, 23 N. Y. Supp. 85.

It is held in Pennsylvania that the return of the sheriff on a summons in action against a foreign corporation showing service upon a person alleged to be the agent of the foreign corporation is a prima facie evidence of good service. *Bragdon v. Perkins Campbell Co.*, 82 Fed. 338; *Fulton v. Commercial Travelers' Mut. Acc. Ass'n*, 172 Pa. St. 117, 33 Atl. 324; *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534. See also *Kennard v. New Jersey R. & Transp. Co.*, 7 Leg. Int. (Pa.) 39, 1 Phila. 41; *Wintermute v. Central R. of New Jersey*, 5 Pa. Co. Ct. 648; *Patton v. Insurance Co.*, 1 Phila. (Pa.) 396.

In *Fulton v. Commercial Travelers' Mut. Acc. Ass'n*, 172 Pa. St. 117, 33 Atl. 324, the court said: "In this case the service was upon one who was not an officer of the company, or in any case its agent. The testimony clearly shows this, and it also tends to show that the matter on which the action was founded was not suable in this court, the business not being transacted in this state. The question raised here seems to be conclusively decided by the case of *Hagerman v. Slate Co.*, 97 Pa. St. 534, where it was held that a return of service under the act of assembly of March 21, 1849, which omits to set forth the character of the agent served is only prima facie evidence of a good service, and may be rebutted by proof to the contrary. The return of service in that case was in almost precisely the same words as in this. On motion of the defendant's attorney, a rule was granted to show cause why the return should not be set aside. Depositions were taken under this rule, which showed conclusively that the person upon whom service was made was the agent for defendant com-

In some jurisdictions it is held that the return of the sheriff, for the purposes of the suit, is conclusive on the parties to it.¹⁴

Where the return of the service of the writ of summons in an action against a foreign corporation fails to show the requisite service, it may be amended to conform to the requirements, if the facts authorize it.¹⁵ Where the return is defective, it may be amended so as to show proper service.¹⁶ An affidavit in support of the motion to amend the return should set forth the facts authorizing the amendment positively and affirmatively and not by stating such matters upon hearsay.¹⁷

It is held by a federal court where, on a motion to quash service of summons in an action against a foreign corporation, it appears

pany, and for this reason the service was sustained. It will be noted also, that the subject-matter of the suit was actionable in this state, it being a scire facias sur mortgage upon the property therein situated. That case establishes the principle that a return of service which, as in the present case, does not set forth the character of the agent served, is presumably good, but may be inquired into, and that depositions may be taken on a motion to set aside the same; and, if the presumption of a good service is conclusively rebutted, it will be set aside. That principle covers the whole question involved in this case."

¹⁴ *State v. Sale*, 232 Mo. 166, 132 S. W. 1119; *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069; *Lebanon Nat. Bank v. Mascoma Flannel Co.*, 70 N. H. 227, 46 Atl. 49.

In *Newcomb v. New York Cent. & H. River R. Co.*, 182 Mo. 687, 81 S. W. 1069, the court said: "The plea to the jurisdiction rests on two propositions: First, that the statements in the sheriff's return are not true, as the affidavits filed show; second, on the face of the return the defendant is not legally summoned. The return of the sheriff, for the purposes of the suit, is conclusive on the parties to it. This rule of law is founded in

the necessity of the case. The court, in *Hallowell v. Page*, 24 Mo. 590, said: 'To permit the parties to an action to controvert the truth of the return of the officer deputed by law to serve the process would produce great delay and embarrassment in the administration of justice.' This court has always adhered to that ruling. *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278; *Jeffries v. Wright*, 51 Mo. 215; *Burgert v. Borchert*, 59 Mo. 80; *Phillips v. Evans*, 64 Mo. 17; *Heath v. Railroad*, 83 Mo. 617; *Decker v. Armstrong*, 87 Mo. 316. If the statements in the return are not true, and the defendant suffers by reason thereof, the officer will answer in a suit against him for a false return. The court in this case, therefore, properly ignored the affidavits filed denying the facts stated in the return."

¹⁵ *Walter A. Zelnicker Supply Co. v. Mississippi Cotton Oil Co.*, 103 Mo. App. 94, 77 S. W. 321; *Delaware Ins. Co. v. Hutto*, — Tex. Civ. App. —, 159 S. W. 73; *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608; *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 32 S. E. 194.

¹⁶ *Delaware Ins. Co. v. Hutto*, — Tex. Civ. App. —, 159 S. W. 73.

¹⁷ *Brown v. Gaston & Simpson Gold & Silver Min. Co.*, 1 Mont. 57.

that the corporation has in the state a managing or business agent upon whom valid service of process might be made, it is proper for the court to authorize the issuance of process out of the court in order that service may be had upon such managing agent.¹⁸

There is considerable conflict of authority whether a foreign corporation, by answering and going to trial on the merits after its motion to set aside the service of process in an action against it, waives the defect, if any, in the service.¹⁹ It is held that by filing a general plea to the merits the defendant waives an objection to the sufficiency of the return.²⁰ A general appearance in the action also waives such objection.²¹ But an appearance of a defendant by a motion for the sole purpose of moving to quash the service of the summons on the ground that the defendant was a foreign corporation, which had no property in the state, and never had and was not then transacting any business in the state, and had no agent or other person in the state upon whom service of summons could be made is not a waiver of the right of the corporation to object to the insufficiency of such service.²²

Under some statutes an order quashing a summons is an appealable order, as it in effect determines the action or proceeding.²³ In a federal case a motion by a foreign corporation to quash the service of the subpoena made on the vice president of the foreign corporation was referred to a master where the affidavit upon which the motion was based failed to set forth whether the foreign corporation was doing business in the district or whether the vice president was in the district, officially representing the corporation.²⁴

§ 6054. Conflict between finding in judgment and return. Though the recital in the judgment of due service of process upon the foreign corporation defendant is conclusive when such judgment is sued upon in another court, in the absence of a showing in the judgment roll as to the exact nature of the service made, yet where the precise nature of the act performed by the officer in making the service is set forth in the judgment roll itself, then the requirements of the law

¹⁸ Knapp v. Bullock Tractor Co., 242 Fed. 543, citing Clark v. Wells, 203 U. S. 164, 51 L. Ed. 138.

¹⁹ Hess v. Adamant Mfg. Co., 66 Minn. 79, 68 N. W. 774.

See generally § 3065 et seq., supra.

²⁰ Newcomb v. New York Cent. & H. River R. Co., 182 Mo. 687, 81 S. W. 1069.

²¹ Ladd Metals Co. v. American

Min. Co., Ltd., 152 Fed. 1008.

²² Ladd Metals Co. v. American Min. Co., Ltd., 152 Fed. 1008.

²³ State v. Pennsylvania Steel Co. of Philadelphia, 123 Md. 212, 91 Atl. 136; Carstens & Earles v. Leidigh & H. Lumber Co., 18 Wash. 450, 39 L. R. A. 548, 63 Am. St. Rep. 906, 51 Pac. 1051.

²⁴ Ryan v. Ohmer, 233 Fed. 165.

authorizing the service to be made, and not the finding of the court rendering the judgment, must control.²⁵

§ 6055. Objection to service after removal of cause to federal court. A foreign corporation, after removing a case from the state court to the federal court, can raise the question of insufficiency of service and the consequent lack of jurisdiction of the court over it.²⁶ Even though the highest court of the state where the suit was instituted had decided that such service of process was sufficient, that fact does not prevent the federal court to which the cause is removed from considering whether or not the service was sufficient to give the court jurisdiction over the defendant, for in cases which concern the jurisdiction of the federal courts, notwithstanding the Conformity Act,²⁷ neither the statutes of the state nor the decisions of its courts are conclusive upon the federal courts, and the ultimate determination of

²⁵ *Swarts v. Christie Grain & Stock Co.*, 166 Fed. 338.

²⁶ *Toledo Railways & Light Co. v. Hill*, 244 U. S. 49, 61 L. Ed. 982; *Cain v. Commercial Pub. Co.*, 232 U. S. 124, 58 L. Ed. 534; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. Ed. 431; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Beach v. Kerr Turbine Co.*, 243 Fed. 706; *Cady v. Associated Colonies*, 119 Fed. 420; *Bentlif v. London & Colonial Finance Corporation*, 44 Fed. 667; *Golden v. Morning News of New Haven*, 42 Fed. 112.

"This subject underwent extensive consideration in the case of *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, and the rule is there stated by Mr. Justice Gray, speaking for the court as follows: 'Service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Courts of the United States after the

removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court.' " *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

Under the federal practice, defects in the service of process in an action against a foreign corporation removed to a federal court from a state court, may be taken advantage of by motion to set aside the service made after the removal. *Beach v. Kerr Turbine Co.*, 243 Fed. 706.

, 27 U. S. Rev. St., § 914, 4 Fed. Stat. Ann. 563, reading: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

such questions of jurisdiction is for the federal court alone.²⁸ The authority of a federal court to which a cause has been removed to determine whether the state court, by virtue of service of process made upon a foreign corporation acquired jurisdiction over the corporation to enter judgment by default against it is not conferred by nor limited by the laws of the state, but is dependent upon the constitutional jurisdiction of such court under the laws of the United States, the federal court must determine for itself the validity of a service of process in a given case, whatever may be the law of a state, or its interpretation by the courts of a state under which a valid service of process may be claimed.²⁹

When a cause is removed from a state court to the federal court, it is to proceed as if brought in the latter court by original process, and the pleadings are to have the same force and effect for every purpose as they would have had by the laws and practice of the state court, if the cause had remained there.³⁰ Consequently, in an action in a federal court against a foreign corporation where a plea in abatement based on the lack of jurisdiction of the defendant would be adjudged insufficient in a court of the state where the federal court is held, on account of the failure of such plea to negative every manner of lawful service, it will also be adjudged insufficient in the federal court.³¹ The federal courts, accordingly, hold that upon the removal to the federal court of an action brought in the state court the return of the sheriff is not conclusive upon the question of service, and when the question is raised in the federal court, the jurisdiction of that court

²⁸ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, distinguishing *Walker v. Robbins*, 14 How. (U. S.) 584, 14 L. Ed. 552; *Knox County v. Harshman*, 133 U. S. 152, 33 L. Ed. 586, and following *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. Ed. 431. See also *Western Loan & Savings Co. v. Butte & B. Consol. Min. Co.*, 210 U. S. 368, 52 L. Ed. 1101; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Mexican Cent. R. Co. v. Pinckney*, 149 U. S. 194, 37 L. Ed. 699; *Cady v. Associated Colonies*, 119 Fed. 420.

²⁹ *Cady v. Associated Colonies*, 119 Fed. 420, quoting with approval *Goldsey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, where the court

said: "The jurisdiction of the Circuit Courts of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a state. The legislature or the judiciary of a state can neither defeat the right given by a constitutional act of Congress, to remove a case from a court of the state into the Circuit Court of the United States, nor limit the effect of such removal."

³⁰ U. S. Rev. St., § 639; *Shampeon v. Connecticut River Lumber Co.*, 37 Fed. 771.

³¹ *Shampeon v. Connecticut River Lumber Co.*, 37 Fed. 771.

will fail if it appears that the corporation attempted to be served was not doing business in the state and the attempted service was not upon one of its agents.³²

The question whether the service of process in an action brought in a state court and subsequently removed to the federal was insufficient on the ground that it had no office, place of business, or agent in, and was not doing business in, the state at the time of the service of summons in the action, and that the person served with the process was not the agent of the defendant at the time of the service, is a question involving the jurisdiction of the federal court, and may be reviewed directly by a writ of error from the Supreme Court of the United States.³³ It is well settled in the federal jurisdiction that a foreign corporation can be served with process within the state only when it is doing business therein, and that such service must be upon an agent who represents the corporation in its business.³⁴

In an action against a foreign corporation brought in a state court and removed therefrom to the federal court sitting in the state, objection to the jurisdiction of the latter court on the ground that the corporation was not doing business in the state and that the person served was not the agent of the corporation at the time of service may be raised by a plea in abatement.³⁵

The question of jurisdiction is open to inquiry when the judgment of a court of the state comes under consideration in a court of the United States sitting in the same state.³⁶

³² *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272; *Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Cady v. Associated Colonies*, 119 Fed. 420.

³³ *Toledo Railways & L. Co. v. Hill*, 244 U. S. 49, 61 L. Ed. 982; *Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

³⁴ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Goldey v. Morning News*, 156 U. S. 518, 39 L.

Ed. 518, 39 L. Ed. 517; *Cady v. Associated Colonies*, 119 Fed. 420; *United States v. American Bell Tel. Co.*, 29 Fed. 17. See § 6051, *supra*.

³⁵ *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272.

³⁶ *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cooper v. Brazleton*, 135 Fed. 476; *Cady v. Associated Colonies*, 119 Fed. 420.

In *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808, Chief Justice Fuller said: "In *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897, a leading case in this court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each state to the public acts,

Where a cause is removed from a state court to a federal court, and a motion to vacate the service of process has been overruled by the latter court, the objection that the foreign corporation was not doing business in the state so as to be amenable to service of process therein is not waived by the filing of an answer setting up various defenses to the merits and besides reasserting the challenge to the jurisdiction.³⁷

§ 6056. Acceptance of service by agent. Where a foreign corporation in accordance with a statute, for the purpose of enabling it to do business within the state, has appointed an agent upon whom process against it may be served, such agent may accept service of process and dispense with the necessity of formal service of process upon him as such agent.³⁸ Thus where, under a statute, a foreign corporation had appointed the commissioner of corporations its attorney upon whom process against it might be served, it was held that an acceptance by him of service of process in an action against the corporation "to the same extent that the plaintiff could have obtained service by leaving a copy of the writ with the commissioner of corporations" was sufficient to enable the court to render personal judgment against the corporation which would be valid everywhere.³⁹

A written acceptance of service in an action against a foreign corporation which fails to show the authority of the person accepting the service to accept the same on behalf of the corporation is insufficient to confer jurisdiction upon the court to render judgment against the corporation.⁴⁰

records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that 'the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist;' and that 'want of jurisdiction may be shown either as to the subject-matter of the person, or, in proceedings in rem, as to the thing.' "

³⁷ Toledo Railways & Light Co. v.

Hill, 244 U. S. 49, 61 L. Ed. 982; St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 57 L. Ed. 486, Ann. Cas. 1915 B 77.

³⁸ Wilson v. Martin-Wilson Automatic Fire-Alarm Co., 149 Mass. 24, 20 N. E. 318; Alliance Assur. Co. v. Bartlett, 9 N. M. 554, 58 Pac. 351. See also New River Mineral Co. v. Seeley, 120 Fed. 193; Owen v. Appalachian Power Co., 78 W. Va. 596, 89 S. E. 262; Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194.

³⁹ Wilson v. Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318.

⁴⁰ New River Mineral Co. v. Seeley, 120 Fed. 193; McKeever v. Supreme

Where a statute contains no provision for acquiring jurisdiction over foreign corporations by an acceptance of service by any of its agents or employees, the authority of an agent or employee to accept service will not be presumed, and the fact that he was an agent upon whom service of process might legally have been made does not, in the absence of a statutory provision authorizing him to accept service, raise any presumption of his authority to bind the corporation.⁴¹

Court Independent Order of Foresters, 122 N. Y. App. Div. 465, 106 N. Y. Supp. 1041; Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S. E. 194. See also Northern Cent. R. Co. v. Rider, 45 Md. 24.

⁴¹ New River Mineral Co. v. Seeley, 120 Fed. 193.

For appearance by foreign corporation and effect thereof, see § 6012, *supra*.

CHAPTER 66

MASSACHUSETTS TRUSTS AND KINDRED ASSOCIATIONS

- § 6057. Introductory.
- § 6058. Historical.
- § 6059. Definition and nature—In general.
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- § 6064. Legality—In general.
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- § 6072. — Exemption of shareholders from liability.
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- § 6099. — Liability to certificate holders or beneficiaries.
- § 6100. — Attachment of property of trust, as property of trustee.
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- § 6102. — Compensation of trustee.
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- § 6110. Applicability of Statute of Uses.
- § 6111. Applicability of Bankruptcy Act.
- § 6112. Governmental control—In general.
- § 6113. — Regulation of business by sister state.
- § 6114. — Regulations applicable only to corporations or prohibiting conducting of certain business except by corporation.
- § 6115. Taxation.

§ 6057. Introductory. Statutory regulation of corporations, based to some extent in particular states on alleged unreasonable hostility to corporations, and the fact that the organization of corporations for one or more purposes is prohibited in some states, have resulted in an attempt, where persons desire to combine their capital for business purposes, to create a form of combination which will, without incorporation, enable the contributors of capital to escape personal liability as partners and, at the same time, secure many or most of the advantages of a corporation. These combinations of capital, organized under the terms of trust deeds, are common in Massachusetts, especially in case of real estate trusts, and have been adopted to some extent in other states. They are generally referred to as "Massachusetts Trusts."¹

It will be impossible in this chapter to consider at length all the questions arising or which may arise in connection with the so-called "Massachusetts Trusts" and kindred unincorporated organizations. As far as the trust is concerned, where it is a pure trust and not a

¹It has been said that such a trust which is not uncommon in Massachusetts is a form of business organization and is very uncommon else-

partnership, reference must be made, in most instances, to standard treatises on Equity and Trusts to determine the general rules governing the rights and duties of trustees, the rights and interests of the beneficiaries, and other matters in no way peculiar to the trusts herein considered. As far as the trust is deemed a partnership, owing to the particular provisions of the trust agreement, reference must be made to works on Partnership for the general rules governing partnerships. Attention is called to the excellent treatises of Mr. John H. Sears on "Trust Estates as Business Companies," published in 1912, and of Mr. Sydney R. Wrightington on "Unincorporated Associations," published in 1916, both of which treat at some length of these trusts and other similar relations, and also to articles which have appeared in various law journals, as hereinafter noticed.

In the treatment of these trusts, the following inquiries necessarily present themselves, and will be considered in order, as follows: 1. The relation created by the agreement. 2. The supposed advantages, if any, of trusts over corporations. 3. The legality of the plan. 4. The form and contents of the trust agreement. 5. Shares and certificates of stock. 6. Rights, powers and duties of trustees. 7. Liability of trust estate. 8. Liability of associates or shareholders. 9. Applicability of certain rules such as those relating to perpetuities, Statute of Uses, bankruptcy, etc. 10. Governmental control. 11. Taxation.

Unincorporated joint stock associations, created by virtue of a statute or otherwise, are not considered herein except incidentally where there is no trust agreement.²

Questions relating to holding companies,³ trust deeds as security,⁴ trusts as monopolies,⁵ voting trusts,⁶ individual liability and rights of persons who attempt to incorporate but who do not form even a de facto corporation,⁷ underwriting agreements,⁸ etc., are all treated of in preceding volumes of this work.

where." In re Associated Trust, 222 Fed. 1012.

² See § 17. See also Wrightington, Unincorporated Association, § 9.

³ See § 3990.

⁴ See §§ 962-1071, 1265-1440.

⁵ See §§ 3380-3403.

⁶ See §§ 1705-1721.

⁷ See §§ 4280-4284.

⁸ See §§ 441-479.

§ 6058. Historical. As early as 1854 the Supreme Judicial Court of Massachusetts referred to companies "formed without incorporation, consisting of considerable numbers, for the purchase of wild lands, with a view to resale or other like purpose," where "the grant is made to trustees in trust for several members designated, and a certificate of such right to an aliquot part of the beneficial interest is usually issued by the trustees to the several parties, indicating what aliquot part each holds in such trust property or beneficial interest."⁹ And it seems that these trusts have been more or less common in Massachusetts for many years, while in other states only isolated cases are found in the decisions which tend to corroborate the view that they have been resorted to but little outside of Massachusetts.

§ 6059. Definition and nature—In general. A Massachusetts trust has been said to be "a combination of capital vested in trustees who issue transferable certificates for shares and execute a declaration of trust designed to provide for the shareholders all the immunities of corporate shareholding."¹⁰ It is used to carry on a business for the mutual benefit of the parties either with¹¹ or without¹² the issuance of shares of stock. "The theory of the 'Massachusetts Trust' is that

⁹ Attorney General v. Federal Street Meetinghouse, 3 Gray (Mass.) 1, 46, writ of error dismissed 1 Black (U. S.) 262, 17 L. Ed. 61.

¹⁰ Article by Mr. S. R. Wrightington of the Massachusetts Bar, 21 Yale Law Journal 310.

The general features of such a trust are that "property is transferred to trustees, who hold the legal title to all the assets belonging to the trust and exercise the exclusive management and control of it, under the terms of the agreement. Certificates of part ownership, resembling shares of stock in a corporation, are issued to those who are the ultimate owners of the property." Kimball v. Whitney, — Mass. —, 123 N. E. 665.

¹¹ United States. Bank of Topeka v. Eaton, 100 Fed. 8, aff'd 107 Fed. 1003.

Idaho. Spotswood v. Morris, 12 Idaho 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094.

Illinois. Hart v. Seymour, 147 Ill. 598, 35 N. E. 246.

Massachusetts. Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

New York. King v. Townshend, 141 N. Y. 358, 36 N. E. 518; Cross v. Jackson, 5 Hill 478; Ward v. Davis, 5 N. Y. Super. Ct. 502.

Pennsylvania. In re Pittsburg Wagon Work's Estate, 204 Pa. 432, 54 Atl. 316.

Texas. Willis v. Greiner, 26 S. W. 858.

England. Smith v. Anderson, 15 Ch. Div. 247.

¹² Mallory v. Russell, 71 Iowa 63, 60 Am. Rep. 776, 32 N. W. 102.

a number of persons may individually contribute their quota of capital to the trustees, under a declaration of trust executed by the trustees, whereby the latter take such capital pursuant to the declaration of trust, and operate the business (whatever it may be) that may be thus created, as principals. The trustees are obligated to manage the trust property, and pay so much of the income as they may determine to the contributors or cestuis que trustent, and when the trust comes to an end pursuant to the declaration of trust, such contributors are entitled to their proportionate share of the corpus of the estate.”¹³ “As such contributors or cestuis qui trustent they simply put the amount contributed by them into the associated fund at the risk of the business.”¹⁴

Such trusts are to be distinguished from voting trusts.¹⁵ Likewise a holding company, although in the nature of such a trust, is ordinarily merely a corporation,¹⁶ although when formed for the purpose of acquiring and holding the stock of corporations they may provide for the voting of such stock by the trustees, and the control of such corporations may be one of the objects of the trust agreement.¹⁷

Such a trust has been held an “unincorporated company” within the meaning of the Bankruptcy Act.¹⁸

§ 6060. — Distinguished from corporations, joint stock associations and other associations. Such trusts are not corporations,¹⁹ and are also to be distinguished from statutory joint stock companies.²⁰

¹³ Article by Mr. Henry J. Aaron of the Chicago Bar, 12 Illinois Law Review 482.

¹⁴ 12 Illinois Law Review 483.

¹⁵ For a full discussion of the subject of voting trusts, see §§ 1705-1721.

¹⁶ Holding companies, see § 3990.

¹⁷ See, for example, *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

¹⁸ See § 6111, *infra*.

¹⁹ *Eliot v. Freeman*, 220 U. S. 178,

55 L. Ed. 424; *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 802; *Spotswood v. Morris*, 12 Idaho 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094; *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737; *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N. E. 284; *Gleason v. McKay*, 134 Mass. 419; *Hoadley v. Essex*, 105 Mass. 519.

²⁰ *Eliot v. Freeman*, 220 U. S. 178, 55 L. Ed. 424; *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark.

They are voluntary associations of individuals, while a corporation can only exist by sanction of the legislature, and must either have received a charter or have been organized as a corporation under a general law.²¹ Such trusts are not within the scope of statutes taxing the income of corporations, joint stock associations or associations.²² And statutes relative to the rights of pledgors and pledgees of corporate stock do not apply to shares issued by them.²³

§ 6061. — Agreement as constituting partnership. An important question is whether a "Massachusetts Trust," or the like, constitutes a partnership.²⁴ This depends on the terms of the so-called trust agreement. "A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owner of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership."²⁵ By referring to textbooks on the law of Partnership, it will be ascertained that, under the modern authorities, the intention of the parties, rather than mere participation in the profits, is the controlling element in determining whether a partnership relation is created, and that mere participation in profits does not create a partnership if the contribu-

146, 188 S. W. 802. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601.

As to the nature of joint stock companies and the distinction between such companies and corporations, see § 17.

²¹ *Spotswood v. Morris*, 12 Idaho 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094; *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213; *Hoadley v. Essex*, 105 Mass. 519.

They are not organized under statutory laws as corporations are. *Eliot v. Freeman*, 220 U. S. 178, 55 L. Ed. 424.

Such a trust is not a creature of the statutes governing the formation of corporations, but is organized and exists at common law. *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171.

In Massachusetts there is no statute authorizing the creation of such institutions. *Bartlett v. Gill*, 221 Fed. 476.

²² See § 6115, *infra*.

²³ *Linnell v. Leon*, 206 Mass. 71, 91 N. E. 895.

²⁴ See article by Mr. Henry J. Aaron in 12 Illinois Law Review 482 on "The Massachusetts Trust as Distinguished from Partnership," and see an excellent discussion of the Massachusetts decisions in regard thereto in *Wrightington, Unincorporated Associations*, § 14.

²⁵ *In re Associated Trust*, 222 Fed. 1012; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

tors of the capital have no control of, or take no part in, the operation of the business.²⁶ In a proper form of declaration of trust, it has been said that "two of the essential elements of partnership are lacking in the relationship established by such a declaration of trust—a 'common' stock, and the 'carrying on of the business' by the *cestuis que trustent* as principals."²⁷ On the other hand, persons who associate themselves together to carry on business for their mutual profit are not prevented from being partners because their shares in the enterprise are represented by transferable and transmissible certificates,²⁸ or because the legal title to the property of the asso-

²⁶ See *Meechem, Partnership*; *Shumaker, Partnership*.

²⁷ 12 *Illinois Law Review* 482, 484.

²⁸ *Spotswood v. Morris*, 12 *Idaho* 360, 6 *L. R. A. (N. S.)* 1094, 85 *Pac.* 1094; *Williams v. Inhabitants of Milton*, 215 *Mass.* 1, 102 *N. E.* 355.

The fact that their interests are made transferable and that there are other provisions for conducting the business in a manner similar to that of a corporation will not prevent them from being partners. *Williams v. Boston*, 208 *Mass.* 497, 94 *N. E.* 808.

A provision for transferable shares, and thus introducing a new partner, is not inconsistent with the contract of copartnership. *Hoadley v. Essex*, 105 *Mass.* 519. See generally *Farnum v. Patch*, 60 *N. H.* 294, 49 *Am. Rep.* 313.

In *Spotswood v. Morris*, 12 *Idaho* 360, 6 *L. R. A. (N. S.)* 665, 85 *Pac.* 1094, in speaking of an association formed to purchase and sell real estate, the title to which was held in trust, and which was held to be a limited partnership, the court said: "Such an association as the one under consideration, not organized for engaging in the real estate business, but for the purpose of acquiring and holding title to a particular piece of real estate, is not a general business partnership. It is not a violation of the Constitu-

tion or statutes for a number of people to get together to acquire a particular piece of property and place the title to the same in a trustee, whose powers and authority are definitely limited and defined and subject to instructions from the shareholders, either directly or indirectly through a board elected by the shareholders at regularly constituted meetings of the shareholders. This constitutes simply a definition of the trusts and powers subject to which a particular piece of real estate is held. The articles of association create a power of attorney to the trustee, subject to the limitations upon the powers in respect to action required either of the shareholders or directors. It is a wholesome method of co-operation which assists in bringing together and organizing small funds into large investments."

In *Hossack v. Ottawa Development Ass'n*, 244 *Ill.* 274, 291, 91 *N. E.* 439, in speaking of a real estate syndicate, whose property was held by a trustee, the court said: "This syndicate agreement made the subscribers substantially a stock company. There is nothing illegal in such an agreement with transferable shares. The transferability of the shares makes such an association different, not merely in magnitude but in other ways, from

ciation is taken in the name of a third person.²⁹ Nor will the fact that the agreement of trust under which the business is conducted provides that neither the associates nor the trustees are to be liable personally for the debts of the trust prevent them from being classed as a partnership for purposes of taxation.³⁰ In another case, the court, assuming for the purposes of its decision that the trust involved was a partnership, stated that by reason of the manner in which the rights and liabilities of the shareholders were safeguarded, the partnership was of a peculiar kind, different from the ordinary partnership.³¹

ordinary partnerships, because the association is not based upon mutual trust and confidence in the skill, knowledge and integrity of the other partners. The sale of shares by a member, the shares being transferable, is not a dissolution, and the death of a member is not a dissolution."

Voluntary associations having stock "are distinguishable from 'partnerships,' as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and that the stock can be bought and sold without affecting the integrity of the concern. In these respects they partake of the nature of corporations, but these peculiar characteristics do not affect the nature or extent of the individual liability as to third parties." *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875.

See also §§ 16, 17, *supra*.

²⁹ *Spotswood v. Morris*, 12 Idaho 360, 6 L. R. A. (N. S.) 1094, 85 Pac. 1094; *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

"The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's conven-

ience holds the legal title to the principal's property." *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

³⁰ *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808.

³¹ *Kimball v. Whitney*, — Mass. —, 123 N. E. 665, in which case the court, while stating that it was not necessary to determine whether or not the Massachusetts Electric Companies, the trust involved, was a partnership, assumed it to be such, but added: "It was not an ordinary business, commercial or trading partnership. The nature of its authorized investments seemingly removed it as far as possible from the common incidents of a co-partnership adventure. Apparently it was guarded as fully as was practicable from speculative features and the oscillations of value incident to varying conditions of trade. * * * The rights of the shareholders were carefully guarded by the terms of the agreement. Their responsibility was reduced to a minimum so far as possible by written statement of obligations. The trustees expressly were given no power to bind the shareholders personally. All persons dealing with the trustees were confined by the agreement to the property of the so-called trust to the exoneration of shareholders. * * * It was required

In a leading case in Massachusetts the characteristics distinguishing a partnership from a trust are stated to be (1) the association of the beneficiaries, and (2) their power as principals to control the management of the property by the trustees, their agents.³² In this case, where it was held that a trust and not a partnership was created, it was said: "The certificate holders are throughout called 'cestuis que trustent.' The certificate holders, or 'cestuis que trustent,' are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders of 'cestuis que

of the trustees to stipulate in every obligation into which they might enter that the shareholders should not be held liable personally."

³² *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355, where the Massachusetts cases are reviewed and distinguished. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

There is a trust where there is no association between the certificate holders, and the property is that of the trustees, and they are the masters, while there is a partnership where the certificate holders are associated together by the terms of the trust, and the property is their property, and they are the masters. *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601.

Under the Massachusetts decisions the distinction "turns upon the provisions of the trust agreement or declaration. In cases where, by the declaration of trust, the shareholders are

given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control, the trust is held, for purposes of taxation, to be of the same sort as the usual testamentary trust, and not to be a partnership. No middle ground is found in the Massachusetts decisions." In *re Associated Trust*, 222 Fed. 1012.

"The tests laid down by Judge Loring [in *Williams v. Milton*, 215 Mass. 1] will require still further definition. How much control by the beneficiaries over the trustee is needed to change a trust into a partnership? Under many of these deeds of trust the only way in which the shareholders can expressly control the action of the trustee is through their power of election at the annual meeting. This indeed may prove a very effectual power to direct his action during his term of office but does it come within Judge Loring's definition of a partnership?" *Wrightington, Unincorporated Associations*, p. 48.

trustent' can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the cestuis que trustent is not to be had in a meeting, but is to be given by them individually."³³

In a later case, the Supreme Judicial Court of Massachusetts held that whether an agreement or trust deed of the character under consideration creates a trust or a partnership "depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created, but if they are subject to the control of the certificate holders, it is a partnership."³⁴ It will be noticed that the latter case omits any reference to the element of association,³⁵ and that in such case the trust was held a partnership merely because the shareholders were given the power to remove trustees at any time without cause and to fill the vacancies, to end the trust at any time and to amend the declaration of trust at any time. So, later, in 1917, it was held in Massachusetts that a declaration of trust providing for meetings of the stockholders and giving them power at such meetings to elect trustees and to alter or amend the declaration of trust created a partnership.³⁶ In a still later case in Massachusetts a real estate trust was held to be a partnership where the certificate holders were associated together, had a fixed annual meeting and special meetings upon the written request of the holders of one-tenth of the shares, were empowered to fill any vacancy existing in the number of trustees and to remove any and all of them and elect others in their place, and where no sale of the real estate could be made by the trustees unless authorized by vote of the stockholders. In that case the court said: "In short, the certificate holders are associated together, they control the property, and for

³³ *Williams v. Inhabitants of Milton*, 215 Mass. 1, 10, 102 N. E. 355. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601.

³⁴ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. See also *Horgan v. Morgan*, — Mass. —, 124 N. E. 32; *Sleeper v. Park*, — Mass. —, 122 N. E. 315.

³⁵ "It would seem that the element of association is essential to a partnership." *Wrightington, Unincorporated Associations*, p. 49.

³⁶ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941, which, however, seems to be an extreme case in favor of the partnership idea.

convenience have placed the legal title to it in trustees as their managing agents.”³⁷ Under the Massachusetts rule, the character of the association is to be determined from the provisions of the trust deed or declaration and the powers which it confers upon the certificate holders, rather than by the extent to which those powers are executed.³⁸ What the parties actually did in making the trust indenture is decisive in determining whether there is a trust or a partnership, rather than a statement therein as to what they intended to do, although such a statement may be considered in determining what they did when that is doubtful.³⁹

Further examples of agreements which are held to create trusts⁴⁰

³⁷ *Priestley v. Treasurer & Receiver General*, 230 Mass. 452, 455, 120 N. E. 100.

³⁸ *In re Associated Trust*, 222 Fed. 1012.

³⁹ *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

⁴⁰ Where the trust property was to be held by the trustees to pay the income to the holders of the certificates, and, on the termination of the trust, to divide the trust fund or its proceeds among them, and the certificate holders, who were called *cestuis que trustent* in the trust indenture, were in no way associated together, and there was no provision for any meetings to be held by them, and the only power they had was to consent, as individuals, to an alteration or amendment of the trust, or to a termination of it before the time fixed in the deed, it was held that the indenture created a trust and not a partnership. *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601.

Where an inventor transferred his invention to trustees, to whom, by the terms of the trust indenture, the patent therefor was to be issued, provision was made for the issuance of transferable scrip or certificates to

persons furnishing money to the trustees for the more advantageous disposition of the invention; the trustees were to hold, manage and dispose of the invention or any part thereof or interest therein upon such terms as they should deem best, the net proceeds to be paid one-half to the certificate holders and one-half to the inventor; and the vacancies in the office of trustee were to be filled by the remaining trustees, it was held that the certificate or scrip holders were not partners, but were *cestuis que trustent*. *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083.

In *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90, it was said that the certificate holders in the trust there before the court were partners for purposes of taxation. But in *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355, it is said that this statement was in no way essential to the decision, and that, “while that trust provided for meetings of the shareholders and in that respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership.”

In *Johnson v. Lewis*, 6 Fed. 27, an English trust provided for the purchase of municipal bonds with funds

or which are held to create partnerships ⁴¹ are discussed in the notes.

A federal court in holding that such an association, created under

subscribed by the certificate holders. The bonds were to be purchased by a "committee" named in the trust deed. The trustees were the legal owners of the trust property, and the business of the trust was to be managed by them and by the committee, and the profits were to be distributed to the certificate holders by means of a drawing. It was held that this was a trust for the purpose of securing investments, and that the certificate holders, who were strangers to each other and had entered into no contract between themselves, nor with any trustee on behalf of each other, were not partners.

In *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907, rev'g 56 Hun 516, 9 N. Y. Supp. 866, it is said that the Standard Oil Trust agreement "constituted not a partnership, but a trust in behalf of the beneficiaries." The affairs of this trust were to be managed by trustees. The first trustees were named in the trust agreement, and their successors were to be elected by the certificate holders.

In *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911, where a merchant transferred his property in trust for the benefit of his creditors by an instrument to which such creditors were parties, it was held that neither the creditors nor the grantor himself were liable for debts incurred by the trustee in carrying on the business, as he was authorized to do. Apparently the trustee had the sole power of control over the business.

In *Smith v. Anderson*, 15 Ch. Div. 247, a trust deed providing for the purchase and holding of shares of stock in submarine telegraph companies was held to create a trust, and not a company, association or part-

nership which was required to be registered under the Companies Act.

In *McGourky v. Toledo & O. C. R. Co.*, 146 U. S. 536, 36 L. Ed. 1079, it was said of certain car trust associations that they "were not corporations or partnerships, nor legal entities of any description, but were simply car-trust certificates in the hands of various persons, who were represented by the petitioner."

⁴¹ There is a partnership, and not a trust, where "the certificate holders are associated together by the terms of the 'trust' and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property. The property is their property. They are the masters." *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

Where the shareholders were given the right to remove the trustees and appoint others in their places without assigning any cause, to terminate the trust at any time, to amend the declaration of trust, and to alter, amend or repeal the by-laws, the association was held to be a partnership, and not a trust. *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. See also *Horgan v. Morgan*, — Mass. —, 124 N. E. 32.

An association formed to purchase cars to be leased to a certain railroad, and whose property was to be held by a trustee, with provisions for transferable certificates and that all the business of the association was to be transacted by a board of managers, to be elected by the certificate holders, was held to be a partnership. *Ricker v. American Loan & Trust Co.*, 140 Mass. 346, 5 N. E. 284.

In *Phillips v. Blatchford*, 137 Mass. 510, the business of the association was under the control of a board of managers, of whom the trustee was

a deed of trust which provided that the trust property should be

to be a member, and the other members were to be elected by the shareholders, and the association was held to be a partnership.

In *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941, a declaration of trust which provided for meetings of the shareholders, at which they should have power to elect the trustees and to alter and amend the declaration of trust, was held to create a partnership.

A declaration of trust under which the trustees hold title to the real estate involved which expressly authorized the trustees "to erect on the lands included in the trust estate dwelling houses and other structures," and "to lease the trust estate or any portion or portions thereof on such terms and for such length of time as they may deem expedient," was held in legal effect to create a partnership. *Sleeper v. Park*, — Mass. —, 122 N. E. 315, following *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941.

The declaration of trust involved in *Hoadley v. Essex*, 105 Mass. 519, and *Gleason v. McKay*, 134 Mass. 419, provided that the certificate holders were to be known as the McKay Sewing Machine Association, and that the business was to be conducted by an executive committee to be chosen by them, and was held to create a partnership.

In *Whitman v. Porter*, 107 Mass. 522, certain subscribers associated themselves together to buy a ferryboat, which was to be conveyed to one of their number in trust. The business was to be conducted by officers and trustees to be chosen annually by the subscribers, and this was held to be a partnership.

The trust involved in *Taber v.*

Breck, 192 Mass. 355, 78 N. E. 472, and *Breck v. Barney*, 183 Mass. 133, 66 N. E. 643, is treated as a partnership in the first mentioned case, but its provisions as to control by the certificate holders are not given nor is the question discussed.

In *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808, it was held that the certificate holders in an association formed under a deed of trust for the purchase, improvement and management of real estate for gain were partners for purposes of taxation. But in *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355, it is said that this statement was in no way essential to the decision, and that, "while that trust provided for meetings of the shareholders and in that respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership."

In *Bisbee v. Mackey*, 215 Mass. 21, 102 N. E. 327, a declaration of trust said to be similar in its terms to those under consideration in *Williams v. Boston*, and *Ricker v. American Loan & Trust Co.*, supra, was held to make the associates copartners.

In *Smith v. Moore*, 129 Mass. 222, a declaration of trust which provided for an executive committee of shareholders who should have the general control and management of the business, and that all votes of the association not inconsistent with the declaration of trust should be binding upon the trustees, was held to create a partnership.

In *Clagett v. Kilbourne*, 66 U. S. 346, 17 L. Ed. 213, a real estate trust was held to be a partnership. It does not appear from the statement of facts what control, if any, the members exercised over the trustees.

In *Hogg v. Hoag*, 107 Fed. 807, aff'd

managed by the trustees and also give the certificate holders power

154 Fed. 1003, it was held that an association operating under a syndicate agreement, providing that a majority of the certificate holders were in every respect to control the trust, was a partnership, which, since its assets were divisible into transferable shares, was in substance, though not technically, a joint stock company.

In *Baker-McGrew Co. v. Union Seed & Fertilizer Co.*, 125 Ark. 146, 188 S. W. 802, it was said that the company there in question "was organized under a scheme known as the Massachusetts Trust and was in effect no more than a partnership." The provisions of the trust agreement are not given.

In *Spotswood v. Morris*, 12 Idaho 360, 6 L. R. A. (N. S.) 1094, 85 Pac. 1094, an association formed for the purchase of a single piece of real estate, the title to which was held by a trustee, was held to be a limited partnership. Under the articles of association its business was managed by its members. See also *Spotswood v. Dernham*, 12 Idaho 400, 85 Pac. 1108.

In *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246, it was held that the certificate holders under a real estate trust were a copartnership, since they were not incorporated. The deed of trust in this case authorized the certificate holders to remove a trustee and to fill vacancies, and to direct and control the action of the trustees.

In *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439, a real estate syndicate having transferable shares, and the title to whose property was held by trustees, was held to be substantially a stock company or a partnership, as between the members themselves. The business of the syndicate was apparently controlled by its members.

In *Farmers' Mutual v. Reser*, 43 Ind. App. 634, 88 N. E. 349, it was held

that a mutual insurance company was an association of individuals partaking of the nature of a partnership. Provision was made for officers of the same character and having the same duties as is usual in the case of corporations, and for trustees who were given control of its funds.

In *Mallory v. Russell*, 71 Iowa 63, 60 Am. Rep. 776, 32 N. W. 102, the members of a real estate trust were held to be partners, although the trust deed did not provide for any control over the trustee by the members, but merely gave them a right to appoint his successor in case of his death, resignation, incapacity or refusal to act.

In *King v. Townshend*, 141 N. Y. 358, 36 N. E. 513, where property was deeded to certain persons described as trustees of the New York City Land Association, and it did not appear that such association was a corporate body or capable as such of taking a legal title, it was held that it must be assumed to have been a partnership of individuals associated for dealing in real estate.

In *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527, the members of a real estate trust were held to be a partnership. The articles of association provided that the trustees were to be chosen from among the stockholders, and also provided for meetings of the stockholders and that the company might become incorporated at any time when it should be so determined by a vote at a regular meeting of the stockholders. This holding was followed in respect to the same trust in *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240, 166 Pa. St. 351, 31 Atl. 114.

In *In re Moss' Appeal*, 43 Pa. St. 23, the shareholders in a real estate

to fill vacancies in the office of trustee and authorized them to change the character, scope and size of the enterprise, or to terminate the trust, by a majority vote, was an "unincorporated company" within the meaning of the Bankruptcy Act, said that it was neither a partnership nor a strict trust, but that the term unincorporated company exactly described it.⁴²

trust were held to be partners as to creditors.

In *Kramer v. Arthurs*, 7 Pa. 165, the shareholders in a real estate trust were held to be a partnership. Whether or not they had any control over the trustees does not appear.

In *Credit Mobilier of America v. Com.*, 67 Pa. St. 233, where a contract was assigned to trustees under an agreement whereby they were to carry it out and divide the profits among the stockholders of a certain corporation in proportion to their shares, it was held that the persons receiving the profits with knowledge of the trust became personally liable on the contract as partners.

In *Galveston City Co. v. Scott*, 42 Tex. 535, and *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710, the shareholders under a real estate trust are called a joint stock company and a partnership. Under the terms of the trust the management of the business was controlled by the stockholders.

In *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875, it was held that a real estate trust was a partnership. In the course of the opinion the court says: "It appears from the plaintiff's allegations that the defendant association is a joint stock company or voluntary unincorporated association, composed of a great number of persons whose interests are evidenced by certificates of stock, and which transacted its business and managed its affairs through named trustees

with prescribed powers. Such concerns are uniformly held throughout the United States to be partnerships, subject to be sued as such, and governed by the laws fixing partnership responsibility." The association was described as "a joint stock association" in the lease involved in this case, but the respective rights of the trustees and shareholders in the management of the business do not appear.

See also *Connally v. Lyons & Co.*, 82 Tex. 664, 27 Am. St. Rep. 935, 18 S. W. 799, where an instrument executed by the owner of a mercantile business, which provided that said business should be carried on by a trustee for the benefit of certain named persons, who were to have no right to control or withdraw their interests, created a trust and not a partnership.

⁴² In *re Associated Trust*, 222 Fed. 1012.

In this case it is said: "To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate holders obligations which neither they nor the creditors of the trust supposed existed. It would be a very unjust result. To hold that the respondent is not an organization, and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. These certificate holders voluntarily united into a business organization, in which they invested their money under a contract by which they acquired certain

Even where the association is regarded as a partnership and the members as ordinary partners, the courts will, as far as possible, give effect to the articles of association or agreement as between the members themselves, where they are the only persons interested.⁴³

The importance of determining whether a partnership is created may arise in connection with a controversy as to the individual liability of the contributors of the capital, a controversy as to whether the property or income is taxable as partnership property, etc. However, it seems that a trust may be considered a partnership for purposes of taxation in some cases, although it would not be considered a partnership so far as the individual liability of the contributors was concerned.

§ 6062. Purposes for which trust may be created. In Massachusetts, these trusts are generally created for the purpose of handling, holding or dealing in real estate. Like trusts have also been created to carry on the business of a firm after the death of a partner; ⁴⁴ to hold, manage and dispose of patents, where the settler's interest was represented by scrip for one-half and where money for carrying on the business was raised by payments by scrip-holders as to the remaining half interest; ⁴⁵ and to carry on, for the benefit both of the owner and of the creditors, a business which had been losing.⁴⁶

Except in so far as limited by general statutes existing in some states confining trusts to specified objects,⁴⁷ a trust to engage in business may be formed for any purpose for which a contract may

individual rights against the trustee, and certain other rights to be exercised by joint action of all the certificate holders. 'Unincorporated company' seems to me exactly to describe what the respondent is.' "

⁴³ *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 291, 91 N. E. 439.

⁴⁴ See *Smith v. Ayer*, 101 U. S. 320, 25 L. Ed. 995; *Burwell v. Cawood*, 2 How. (U. S.) 560, 11 L. Ed. 378; *Raybould v. Turner*, 82 L. T. (N. S.) 46; *Ex parte Richardson*, 3 Mad. Ch. 79;

Ex parte Garland, 10 Vesey 110.

⁴⁵ *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083, holding scrip owners not liable for debts created by trustees.

⁴⁶ *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911; *Cox v. Hickman*, 9 C. B. (N. S.) 47, rev'g 8 H. L. C. 268; *In re Stanton Iron Co.*, 21 Beav. 164.

⁴⁷ See, for instance, New York statutes as to trusts involving real property.

lawfully be made, subject to any local statutes to the contrary and subject, of course to federal and state anti-trust legislation.⁴⁸ Thus, it has been held in Illinois, in case of an attempted corporation formed for a purpose for which no law existed authorizing the creation of a corporation, that "an association of individuals for the purpose of purchasing the leasehold estate and constructing a building thereon was not illegal. Such a purpose is not prohibited by law or contrary to public policy. The association was illegal only because it took the form of an incorporation not authorized by law, but it was not criminal."⁴⁹ However, if a state statute limits the right to do a particular kind of business such as banking, insurance or building and loan, to corporations, a trust cannot be created to carry on such a business, according to the general construction of such statutes as being constitutional enactments.⁵⁰

§ 6063. Reasons and advantages of trust instead of corporation.

It is said by Mr. Sears in his valuable work on "Trust Estates as Business Companies," that "the privilege of corporate organization apparently has come to be considered, either so valuable as to stand the impact of all kinds of regulation, or so defenseless against statutory purpose as to make indulgence in that regulation the sport of legislatures. Therefore, it may not be the cause of wonder, that business and enterprise, demanding such aggregation of means as is afforded by the ownership of shares of stock in corporations, are seeking other agencies than corporations for their uses."⁵¹ The advantages of this form of organization are that it "permits individuals to combine their capital and do what they could do as stockholders in a corporation, without being subject to the regulation of the state," and without, on the other hand, being subjected to liability as partners.⁵² The Supreme Judicial Court of Massachusetts has stated

⁴⁸ Anti-trust legislation, see Chap. 54, *supra*, on Monopolies and Trusts.

⁴⁹ *Johnson v. Northern Trust Co.*, 265 Ill. 263, 269, 106 N. E. 814.

⁵⁰ See § 6114, *infra*.

⁵¹ Sears, *Trust Estates as Business Companies*, 3.

⁵² 12 Illinois Law Review 483. See also 21 Yale Law Journal 311, and report of Massachusetts tax commissioner of Jan. 17, 1912.

that associates interested in a business enterprise may obtain thereby "most of the advantages belonging to corporations, without the authority of any legislative act, and with freedom from the restrictions and regulations imposed by law upon corporations."⁵³ In Massachusetts, according to the 1912 report of the tax commissioner, the consensus among investors was that "the rights of shareholders, the terms of office of trustees, their compensation, powers, duties and limitations are more satisfactorily regulated by the terms of the trust agreement, which can be drawn to meet the special need in each case, than could be possible under the general corporation laws." The advantages of trusts over corporations, as stated by the tax commissioner of Massachusetts in 1912, are that the form of organization ensures a continuity of management and control which appeals strongly to investors and which cannot be secured by a corporation with changing officers, that the trustees are not so likely to be changed as are the officers of a corporation, that the trust affords a more economical and more convenient and flexible form of management than does a corporation, since trustees can transact business with more ease and rapidity than directors.⁵⁴ In Massachusetts it is said that the real estate trusts in the city of Boston alone own property valued at a quarter of a billion.

The suggested advantages of these trusts, over corporations, have also been stated as follows:⁵⁵

1. The doing of business upon the common-law right of contract with freedom from all statutory exactions that may be imposed upon corporations both foreign and domestic, as merely artificial persons.

2. The right of trustees to apply to courts for direction in the execution of their powers, whereby their acts are given legal certainty in advance of their commission.⁵⁶

3. The protection of *cestuis que trustent*, in their dealings with trustees, their right to accountings and full information, without the right, however, of securing information for improper purposes.

⁵³ *Hussey v. Arnold*, 185 Mass. 202,
70 N. E. 87.

⁵⁶ *Sears, Trust Estates as Business Companies*, §§ 123-126.

⁵⁴ Mass. Acts 1911, c. 55.

⁵⁵ *Sears, Trust Estates as Business Companies*, § 3.

4. The protection of creditors in "following" the "trust fund" and their right against trustees individually in cases of fraud.

5. The freedom with which the terms of a trust instrument may be framed for the conduct of a particular business and according to the lawful preference of its equitable owners.

6. Latitude in amendment of provisions of management, as experience may show is desirable.

7. The winding up of a business expeditiously and without resort to proceedings at law, with their consequent burden of delay and expense, under express provisions of the trust instrument, upon any termination of the trust.

Another reason suggested in favor of the formation of a trust rather than a corporation, in case of an association doing business over a wide territory, is the difference in the statutes regulating corporations in the several states, the constant changing of the statutes, the necessity for resort to the courts to construe such statutes or to test their validity and the consequent unpopularity of corporations because of the prevailing impression that they are not law-abiding bodies.⁵⁷

§ 6064. Legality—In general. Trusts of the nature already stated are not deemed to be against public policy unless they violate the anti-trust laws⁵⁸ or are otherwise in restraint of trade or created for an illegal purpose. A joint stock company or partnership with transferable shares, although not incorporated, is not illegal, in the absence of a statutory provision to the contrary,⁵⁹ and the validity of these trusts has been repeatedly recognized.⁶⁰ As has been seen heretofore, generally, at least in Massachusetts, such trusts are created for the purpose of holding, selling or dealing in real estate, but it seems that they may be created for any purpose not prohibited by law or contrary to public policy.⁶¹

⁵⁷ Sears, *Trust Estates as Business Companies*, §§ 5, 6.

⁵⁸ See Chap. 54, *supra*, on Monopolies and Trusts.

⁵⁹ *Spotswood v. Morris*, 12 Idaho 360, 378, 6 L. R. A. (N. S.) 1094, 85

Pac. 1094; *Phillips v. Blatchford*, 137 Mass. 510.

⁶⁰ See *Clagett v. Kilbourne*, 66 U. S. 346, 17 L. Ed. 213; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

⁶¹ See § 6062, *supra*.

§ 6065. — Formation to evade creditors. As said in a Massachusetts case where a purchaser of land formed a real estate trust with the aid of dummies, "it is not possible for a debtor to screen his property from his creditors or place it beyond the reach of direct attachment for his personal debts by the adoption of any such business contrivance as that here disclosed."⁶²

§ 6066. Who may create trust. A corporation cannot enter into a partnership and hence it cannot create a real estate trust to deal in its lands, where other beneficiaries are to be brought in to contribute money to be used in conducting the enterprise.⁶³ And a railroad company possessed of valuable real estate no longer available for railroad purposes, which it was its duty to dispose of, has no power to create a real estate trust and deed the property to the trustee to deal with it for a term that might last nearly a century, with practically the powers of an absolute owner.⁶⁴

So far as trusts in general are concerned, the rule is that "all persons, sui juris, have the same power to create trusts that they have to make a disposition of their property."⁶⁵

§ 6067. Form and contents of trust agreements—In general. The contents of trust agreements in case of contributors of capital to engage in a business enterprise call for careful consideration. Forms of trust agreements as set forth in treatises on this subject⁶⁶ and, in whole or in part, in the reported decisions,⁶⁷ are not to be slavishly followed, but should be referred to as containing valuable suggestions.

⁶² *Cunningham v. Bright*, 228 Mass. 385, 388, 117 N. E. 909.

⁶³ *Williams v. Johnson*, 208 Mass. 544, 552, 95 N. E. 90.

⁶⁴ *Williams v. Johnson*, 208 Mass. 544, 95 N. E. 90.

⁶⁵ *Perry, Trusts and Trustees* (6th Ed.), § 28.

⁶⁶ See *Sears, Trust Estates as Business Companies*, § 277 et seq.; *Wrightington, Unincorporated Associations*, § 315 et seq.

For the form of an agreement drafted by Alexander Hamilton, see *Works of Hamilton*, vol. 7, p. 838; *Sears, Trust Estates as Business Companies*, p. 340.

⁶⁷ For a form of a declaration of a real estate trust, see *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213, and *Priestley v. Treasurer & Receiver General* (230 Mass. 452), as reported in 120 N. E. 100 where two forms of real estate trusts are set forth in full.

The trust agreement properly commences as follows: "An agreement and declaration of trust made by the subscribers, this — day of —, for the purpose of —."

§ 6068. — **Adoption of name.** It is usual to provide in the agreement that the title of the trustees, in their collective capacity, shall be "Trustees of —" or that they shall be designated as the "— Trust" or the like.⁶⁸ Statutory regulations of names must, however, be noticed, such as statutes existing in some states forbidding unincorporated bodies to use a name implying corporation.⁶⁹ Registration of the name may be necessary under local statutes.

§ 6069. — **Definition of terms "trustees" and "shareholder."** In one trust deed⁷⁰ it is provided that "the term 'trustees' hereinafter used shall mean not only those above mentioned, but whoever may be trustee or trustees for the time being. The term 'shareholder' hereinafter used shall mean holder of record of a certificate of shares hereunder."

Care is to be taken, it has been said, that "in change of trustees the trust instrument specifically should provide that their successors

For the form of articles of association for the purchase and sale of a single piece of real estate which were held to create a limited partnership, see *Spotswood v. Morris*, 12 Idaho 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094.

The Standard Oil Trust agreements are set out in *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

For form of trust agreement under which the Great Northern ore certificates were issued, see *In re Bunker's Estate*, 77 N. Y. Misc. Rep. 320, 137 N. Y. Supp. 104. See also, as to this trust, *Vehner v. Great Northern R. Co.*, 117 Minn. 447, 136 N. W. 271.

The terms of a trust agreement for the purpose of carrying out a contract for the construction of a part of the Union Pacific Railroad for the benefit

of the stockholders of the Credit Mobilier, are set out in *Credit Mobilier of America v. Com.*, 67 Pa. St. 233.

A trust agreement for establishing and carrying on a newspaper enterprise is set out in *Holt v. Blake*, 47 Me. 62.

⁶⁸ In the case of the Boston Personal Property Trust, involved in *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355, the declaration of trust merely provided that "this trust shall be designated the 'Boston Personal Property Trust.'"

⁶⁹ See § 749.

⁷⁰ See *Homans Real Estate Trust Deed* as set forth in full in *Priestley v. Treasurer & Receiver General*, as reported in 120 N. E. 100, but not included in the official report of the case as it appears in 230 Mass. 452.

succeed to the same rights and powers and are subject to same duties and liabilities and have like compensation as the former trustees.”⁷¹

§ 6070. — Statement as to creation of trust rather than partnership. In the case of the Boston Personal Property Trust, the agreement provided that “it is expressly provided that a trust, and not a partnership, is hereby created,”⁷² but such a statement does not of itself prevent the creation of a partnership rather than a pure trust where the agreement contains provisions in effect making it a partnership, as already explained.⁷³

§ 6071. — Provisions as to certificates or shares. Where certificates or shares are to be issued, the trust agreement usually provides how they are to be issued; the amount and the different kinds, if any; the form and contents of the shares or certificates; the mode of transfer and the necessity for recording the transfer; the mode of increasing or reducing the number of shares; the payment of dividends; the nature of the shares as personal property; and that the death of a holder shall not operate to determine the trust nor entitle the representatives of the deceased to an accounting or to take any action in the courts. In the case of the trust known as the “Massachusetts Gas Companies” it was also provided that “the ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property, or right to call for a partition or division of the same, or for an accounting; and no shareholder shall have any other or further rights than the rights of a stockholder in a corporation, so far as the same may be applicable.”

§ 6072. — Exemption of shareholders from liability. The trust agreement usually expressly exempts shareholders from personal liability, although, if the trust is a pure trust and not a partnership, they are not liable, regardless of whether the agreement contains such a provision.⁷⁴ However, if the agreement be construed as creating

⁷¹ Sears, Trust Estates as Business Companies, § 155, subd. 9.

⁷³ See § 6062, *supra*.

⁷⁴ See § 6106, *infra*.

⁷² See *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

The provision exempting shareholders may be as follows: “The trus-

a partnership among the associates, the partners ordinarily are personally liable,⁷⁵ and such a provision is of no effect unless the other party to the contract had notice thereof at the time of the creation of the contract. The law on this phase of the question, so far as partnerships generally are concerned, has been stated as follows: "In the absence of statute, the only effectual way of limiting the liability of a partner would seem to be stipulation with each creditor that he shall be paid only out of the funds of the partnership, and that he shall not be entitled to require the individual partners to pay more than a certain amount. Certainly a limitation contained in the articles of association would not bind a creditor who had no notice of such limitation at the time when the indebtedness was incurred."⁷⁶

§ 6073. — Stipulation as to liability of trustee and as to his indemnity. It is usual, in order to protect the trustee or trustees from personal liability on contracts, to expressly provide in the trust agreement that he or they shall not be personally liable thereon,⁷⁷ and it is also sometimes expressly provided that in every written contract or obligation which the trustee or trustees shall give or enter into it shall be the duty of the trustee or trustees to stipulate that the trustee or trustees shall not be held to any personal liability under or by reason of such contract or obligation. In addition, it is wise to insert a general provision for indemnity of the trustee as to any act or contract within his rightful discretion as trustee, for which he

tees shall not have any power or authority to enter into any contract that shall bind or affect the shareholders personally, or call upon them for any payment whatsoever other than the amounts of their respective subscriptions."

⁷⁵ See § 6106, *infra*.

⁷⁶ 22 Am. & Eng. Enc. Law (2nd Ed.), p. 173.

⁷⁷ This clause in one Massachusetts trust was worded as follows: "The Trustees shall have no power to bind the shareholders personally, and the subscribers and their assigns and all

persons or corporations extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable to them from the Trustees, so that neither the Trustees nor the shareholders, present or future, shall be personally liable therefor."

Liability where no stipulation, see § 6095, *infra*.

might be adjudged personally liable.⁷⁸ It is also not uncommon to insert a provision that each trustee shall be liable only for his own acts and then only for wilful breach of trust.⁷⁹

§ 6074. — **Statement as to powers of trustees.** The agreement should state the powers of the trustees, vest the legal title in them and confer on them absolute control of the trust property. However, it would seem that too great precision in defining the powers and duties of the trustees, so as to hamper them in the exercise of discretion in the management of the business, is to be avoided. It has also been said that "the right of trustees to act singly or by a majority or collectively, either generally or specially, should be set forth, and whether or when their contracts should be in writing, or, if oral, what ratification, if any, of a single trustee's acts should be required as a condition precedent to their validity."⁸⁰ In case of real estate trusts, it is common expressly to confer power on the trustees to mortgage or lease the property, sell all or part of the property, borrow money, exchange and purchase land, hire offices, etc., and sometimes a blanket provision is added giving the trustees power "to make all such contracts and do all such things as they may think best for the maintenance and management of the trust property and of the trust and may pay all expenses out of any assets of the trust."⁸¹

In some cases it is well to insert in the agreement a provision as to investments of funds by the trustee. In the trust agreement known as the Boston Personal Property Trust, there was a provision as follows: "The Trustees shall have as full power and discretion, as if absolute owners, to invest and reinvest the trust fund (including any surplus and also income) in personal property, including bonds and notes or obligations secured upon real estate, and the decision of the Trustees as to what is personal property shall be final. They shall have the like power of investment in the purchase and improvement of real estate in the cities of the United States of America, for the

⁷⁸ See Sears, Trust Estates as Business Companies, § 159.

⁷⁹ See § 6096, *infra*.

⁸⁰ Sears, Trust Estates as Business Companies, § 155.

⁸¹ Whether trustees in general have implied power to borrow money or mortgage, etc., see Beach, Trusts and Trustees, § 448 et seq.

purpose of leasing the same upon long terms, or ground rents so-called."

In a particular trust agreement (Boston Real Estate Trust Agreement) is found this provision: "When any trustee is absent from the commonwealth or incapable by reason of disease, the other trustees shall have all the powers hereunder, and any trustee may by power of attorney delegate his powers for a period not exceeding six months at any one time to any other trustee or trustees hereunder, provided that in no case shall less than three trustees actually exercise the powers hereunder. The term 'said trustees' used in this agreement shall be deemed to mean those who are or may be trustees for the time being."

§ 6075. — Provisions as to insurance. It has been said that "the trust agreement may particularly authorize various kinds of insurance, or place it generally within the discretion of trustees. Insurance against tort liability, as now carried by many corporations, is particularly appropriate where the trust is carrying on a business involving these hazards. Bonds from employees may also be considered as particularly desirable." ⁸²

§ 6076. — Provision as to resignation of trustee. A provision may be inserted as follows: "Any trustee under this agreement may resign his trust by a written instrument signed by him and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument shall be recorded in the — office for the county of —, state of —."

§ 6077. — Provisions as to meetings of shareholders and proceedings thereat. The agreement should provide for annual meetings of the shareholders, the date thereof and the mode of giving notice of the meetings, as by mail or advertising or both or either. It also properly provides as to how special meetings may be called. Generally, it is provided that any shareholder may vote by proxy, and it is

⁸² Sears, Trust Estates as Business Companies, § 160.

sometimes provided that no business shall be transacted at such a meeting unless the holders of a majority of the outstanding shares are present in person or by proxy. Provision is also usually made for the election, removal or change of trustees at such meetings, as well as the filling of any vacancy existing in the number of trustees, and also as to the power of the stockholders to then and there alter or amend the trust agreement. It is also usual to require the trustees to report their receipts and expenses at the annual meeting. It should be kept in mind, however, that, according to the late Massachusetts cases, the conferring of power on the shareholders to remove trustees at any time and appoint successors and to amend the trust agreement, gives such control to the shareholders as to make the agreement a partnership rather than a pure trust.⁸³

§ 6078. — Inspection of books. A provision that “the books of the trustees shall always be open to the inspection of the cestuis que trustent” is found in some trust agreements. In one agreement it was provided that the trustees “shall open their books at all times during business hours to the inspection of any shareholder and investor.”

§ 6079. — Compensation of trustees. The agreement sometimes merely provides for a reasonable compensation for the services of the trustees, sometimes fixes a per cent as their maximum compensation, and sometimes expressly fixes a certain sum or per cent or both as the compensation. If no provision is made, they are entitled to reasonable compensation.⁸⁴

§ 6080. — Provision as to termination of trust. The necessity for stating a fixed time for the life of the trust, to avoid the rule against perpetuities, is stated hereafter.⁸⁵ It is usual to provide that the trust shall continue for twenty or twenty-one years after the death of the last surviving subscriber, with a proviso as to earlier termination by the acts of the cestuis que trustent. Oftentimes there is inserted

⁸³ See § 6061, *supra*.

⁸⁵ See § 6109, *infra*.

⁸⁴ See § 6102, *infra*.

a provision in the trust agreement that the cestuis que trustent, by the vote of a certain proportion of them, shall have power to terminate the trust at any time; but it may be that such a provision prevents the creation of a pure trust and creates instead a partnership.⁸⁶

§ 6081. Who may be trustee. This question has not arisen in connection with the particular trusts now being considered, and hence it is necessary to refer to the law governing trusts generally. Suffice it in this connection to state, that whoever is capable of taking the legal title or beneficial interest in property, may take the same in trust for others;⁸⁷ that a corporation may be a trustee, in a proper case;⁸⁸ that nonresidence is no disqualification⁸⁹ nor is insolvency;⁹⁰ and that a cestui que trust is not absolutely prohibited from occupying the relation of trustee for his own benefit, especially where he is but one of several trustees,⁹¹ but the same person cannot be at the same time sole trustee and sole beneficiary, since, in such case, there is a merger of the legal and equitable title.⁹²

§ 6082. Recordation of trust agreement. Provisions for recording deeds generally apply to instruments creating a trust, and in Massachusetts a statute expressly requires the filing of declarations of trust of the nature herein considered.⁹³

§ 6083. Subscriptions to stock. Subscriptions to the stock of the association may be enforced for its benefit or for the benefit of the other shareholders, on its dissolution.⁹⁴ A trustee has no right to

⁸⁶ See § 6061, *supra*.

⁸⁷ Perry, *Trusts and Trustees* (6th Ed.), § 39.

⁸⁸ See §§ 932-936.

⁸⁹ *Shirk v. LaFayette*, 52 Fed. 857; *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 146; *Roby v. Smith*, 131 Ind. 142, 15 L. R. A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093; *Van Boskerck v. Herriek*, 65 Barb. (N. Y.) 250.

⁹⁰ *Rankin v. Bancroft*, 114 Ill. 141, 3 N. E. 97.

⁹¹ *Beach, Trusts and Trustees*, citing *Rogers v. Rogers*, 111 N. Y. 228, 18 N. E. 636; *Moke v. Norrie*, 14 Hun (N. Y.) 128.

⁹² See *Weeks v. Frankel*, 197 N. Y. 304, 90 N. E. 969.

⁹³ See § 6112, *infra*.

⁹⁴ *Hogg v. Hoag*, 107 Fed. 807, *aff'd* 154 Fed. 1003.

In this case it was held that a person to whom were issued certificates representing the shares of subscribers who had not paid their subscriptions

forfeit the stock of a shareholder for nonpayment of a call or assessment thereon, in the absence of a provision to that effect in the trust agreement.⁹⁵ But where there is such a provision in the agreement he may sell the stock for nonpayment of a valid assessment,⁹⁶ provided all conditions precedent prescribed by the articles of association are complied with.⁹⁷

§ 6084. Beneficiaries of trust—In general. Who are the beneficiaries of the trust is to be determined from a construction of the instrument creating it.⁹⁸ Where the certificate holders are partners, who are all natural persons capable of becoming beneficiaries of the trust and whose identity is fixed and determined by the trust deed, the deed is not void by reason of the incapacity of the beneficiaries to take and hold the title.⁹⁹

§ 6085. — Interest of members or shareholders in trust property. The trust property is the joint property of the members of the association,¹ and the individual shareholders have no title to it, either as tenants in common or otherwise, and can neither convey nor incumber it.² But while the trustees hold the legal title to such property, the

succeeded to the position of such subscribers and assumed their liabilities for the amount unpaid, upon the principle of novation.

⁹⁵ *Durkee v. Stringham*, 8 Wis. 1.

⁹⁶ *Joseph v. Dayenport*, 116 Iowa 268, 89 N. W. 1081, where it was held that the stockholder was estopped by laches to attack the validity of the assessment or forfeiture.

⁹⁷ *Morris v. Metalline Land Co.*, 164 Pa. St. 326, 166 Pa. St. 351, 31 Atl. 114, 27 L. R. A. 305, 44 Am. St. Rep. 614, 30 Atl. 240, where an attempted forfeiture was held to be invalid for failure to comply with requirements as to publication of notice.

⁹⁸ In *Credit Mobilier of America v. Com.*, 67 Pa. St. 233, it was held that the stockholders of the Credit Mobilier, and not the corporation itself,

were the beneficiaries under a trust to perform a contract for the construction of a part of the Union Pacific Railroad, and hence that the corporation could not be taxed on profits derived from it and paid to its stockholders as dividends.

⁹⁹ *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

¹ *Williams v. Boston*, 208 Mass. 497, 500, 94 N. E. 808; *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710.

² *Brown v. Gilman*, 4 Wheat. (U. S.) 255, 4 L. Ed. 564; *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527; *Kramer v. Arthurs*, 7 Pa. 165.

That this is true in the case of stockholders of a corporation, see § 3433, supra.

stockholders are the equitable owners of it,³ in proportion to the number of their shares.⁴ And when the affairs of the association are wound up, they are entitled to have its assets remaining after payment of its debts distributed among them in that proportion.⁵ "While

³ *Claggett v. Kilbourne*, 66 U. S. 346, 17 L. Ed. 213; *Bartlett v. Gill*, 221 Fed. 476; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435; *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912 A 902, 93 N. E. 586; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Durkee v. Stringham*, 8 Wis. 1. See also *Attorney General v. Federal Street Meetinghouse*, 3 Gray (Mass.) 1, writ of error dismissed 1 Black (N. S.) 262, 17 L. Ed. 61.

The certificate holders are the beneficial owners of the trust property. *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949.

They are joint owners of the property. *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808.

Each shareholder is in equity a joint owner of the property with the other shareholders. *In re Moss' Appeal*, 43 Pa. St. 23.

"The certificate holder is at least the owner of an undivided equitable interest in the property held by the trustees." *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

"All who have any proprietary interest in it have rights of property as individual owners, subject to such restraints upon the management and use of it as are legally imposed by the contracts under which it is held. They are equitable tenants in common." *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737.

The certificates of stock represent a proportionate interest in the property of the corporation, which a court of equity will protect. *Durkee v. Stringham*, 8 Wis. 1.

In *Crawford v. Gross*, 140 Pa. St. 297, 21 Atl. 356, so-called certificates of stock were held to be merely evidence of loans to the association by the subscribers and an informal pledge of the property, bought with the money subscribed, as security for the money advanced, giving the holders an equitable lien thereon, and not to give them any proprietary interest therein.

⁴ *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Durkee v. Stringham*, 8 Wis. 1.

The interest of any person in the trust property is determined by the number of shares he holds. *Kountz's Appeal*, 204 Pa. 432, 54 Atl. 316.

The extent of his interest is shown by his certificates of stock. *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

⁵ *Randolph v. Nichol*, 74 Ark. 93, 84 S. W. 1037; *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435. See also *Smith v. Virgin*, 33 Me. 148.

The certificate holders are entitled in equity to whatever belongs in equity to the fund. *Hogg v. Hogg*, 107 Fed. 807, aff'd 154 Fed. 1003.

Every person interested as owner of stock or a creditor of the association is a proper party to a suit to wind up its affairs and to distribute its assets among its members. *Randolph v. Nichol*, 74 Ark. 93, 84 S. W. 1037.

the legal title is in the trustees, their ownership is fiduciary, and the certificate holders are the ultimate proprietors of the property, which is held and managed for their benefit, and which must be divided among them at the termination of the trust."⁶ "There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation."⁷ The rights of shareholders constitute not choses in action but a substantial property right.⁸

§ 6086. Shares and certificates of stock—In general. Shares of stock in an association of the character under consideration are a substantial property right, and are not mere choses in action.⁹ They are generally held to be personal property, although the trust property consists in whole or in part of real estate.¹⁰ So it has been held that a provision that the capital of the association shall be deemed and treated as personal property notwithstanding the conversion of any part of it into land, is valid as between the parties.¹¹ And also where it is provided that land conveyed to a trustee shall be sold and the proceeds distributed from time to time to the members of the association, who are partners, the land is to be deemed personalty in so far as the rights of such members are concerned, and the wife of a member is not entitled to dower therein as against a purchaser from

⁶ *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435.

⁷ *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

⁸ *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372.

⁹ *Bartlett v. Gill*, 221 Fed. 476; *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435. See also *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372, and § 3429 et seq., supra.

¹⁰ *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527; *Kramer v. Arthurs*, 7 Pa. 165.

Where the by-laws provide that the

stock shares and interest of the members shall be assignable and transferable by the holder thereof in person or by attorney only on the books of the company, and that upon such transfer the assignee of the shares shall succeed and become subject to all the rights and liabilities of an original stockholder, the interest of a stockholder is personalty, although the trust property is real estate, and it cannot be sold under execution as real estate. *Kountz's Appeal*, 204 Pa. 432, 54 Atl. 316.

This is true of shares of corporate stock. See § 3429, supra.

¹¹ *Durkee v. Stringham*, 8 Wis. 1.

the trustee.¹² The Supreme Judicial Court of Massachusetts has held that where the trust property consists of real and personal property, and the declaration of trust creates a partnership and provides that on the termination of the trust all the partnership real estate shall be converted into personalty, and that throughout the life of the partnership the beneficial interest in it shall be represented by transferable certificates, it, in effect, provides that the property of the trust partnership shall constitute one fund, and hence that the conversion into personalty must be taken to date from the beginning to make the fund one fund from the beginning, and the shares are personal property.¹³ It was further held in this case that an interest under a deed of trust was real estate, where all the trust property was real estate, and the beneficiaries were not associated together in any way and there was no provision for the issue of shares to represent their interests, although there was a provision restricting the assignment by the beneficiaries of their interests, and it was provided that the real estate remaining unsold at the termination of the trust should be sold, and the proceeds divided among the beneficiaries. Under such circumstances it was held that there was no conversion until the date when the sale was directed to be made.¹⁴ But it was also held that the interest of a pledgee of the interest of a beneficiary under the latter trust was personal property, and subject to a legacy tax as such upon his death.¹⁵ A federal court in Massachusetts in an earlier case involving shares of stock in a trust organized and owning property in that state, held that where the property of the trust consisted in part of real estate and there was no imperative direction to the trustees to sell it during the life of the trust, the interest of a shareholder was an equitable interest in real estate, and not personal property, and hence was not subject to a legacy tax under the War Revenue Act of 1898

¹² *Mallory v. Russell*, 71 Iowa 63, 60 Am. Rep. 776, 32 N. W. 102.

¹³ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941, approved in *Priestley v. Treasurer & Receiver General*, 230 Mass. 452, 120 N. E. 100.

¹⁴ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941.

The fact that it was impliedly provided that the interest of a beneficiary might pass by assignment was held not to make such interest personalty, since an equitable interest in realty may be transferred in that manner.

¹⁵ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941.

on his death, and that this was true even though the trust agreement provided that the shares should be personal property and be assignable like shares of stock in a corporation without complying with the formalities necessary for a conveyance of real estate, and that the shareholders should have no legal or equitable interest in the trust property. It was further held in this case that a discretionary power in the trustees to sell the real estate would not work a conversion, and that an imperative power to sell it at the termination of the trust would not work a conversion until that time arrived.¹⁶ In a later case in Massachusetts, involving a real estate trust, where there was no imperative requirement that the property be sold and the proceeds distributed among the shareholders, and the trustees were authorized to sell the property at the expiration of the trust only in default of action relative thereto by the stockholders, and the trust agreement created a partnership relation among the certificate holders as distinguished from a pure trust, it was held that there was no equitable conversion of the real property into personalty, and that the partnership real estate, while personalty as far as necessary to pay the debts of the firm, was real property for all other purposes, and that the shares constituted real estate or an interest therein within the statute relating to succession taxes.¹⁷

If the shares are held to be personal property, they have a situs at the domicile of the shareholder, and on his death will pass to his executor by virtue of the laws of his domicile, and are subject to a

¹⁶ *Bartlett v. Gill*, 221 Fed. 476.

This holding was based on the ground that under the Massachusetts decisions the shareholders have an equitable interest in the trust property, and that, since there was no conversion of the real estate into personalty, the interest of a shareholder was an equitable interest in real estate. The court held that a provision that the shares should be personal property could not make them personalty if they would otherwise be an equitable interest in realty, and that, under the holdings of the Massachusetts court the shares "represent

equitable interests in the corpus of the trust, and, that being the case, their character is determined by the nature of the corpus, and, if the corpus is real estate, it would seem that their transferability would depend upon the law governing the transfer of interests in real estate in the absence of legislative authority making special provision for their transfer." This decision was referred to in *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941, but the court expressly refused to follow it.

¹⁷ *Priestley v. Treasurer & Receiver General*, 230 Mass. 452, 120 N. E. 100.

succession tax prescribed by those laws, although the trust property is situated outside of the state.¹⁸ And it has been held that they have a situs for purposes of administration on the estates of deceased shareholders,¹⁹ and for purposes of a succession tax,²⁰ in a state where the trustees reside, and where the home business office of the trust is located and the certificates of its stock can alone be transferred on its books, even though the certificate holder does not reside there; and the certificates themselves are not within the state.²¹

The shares are the several property of the individual stockholders, and are not the property of the association.²²

As in the case of corporate stock,²³ the certificate is not the stock

¹⁸ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941.

¹⁹ Shares of stock are "found" in the state within the meaning of a statute providing that when administration on the estate of a nonresident is taken in the state, "his estate found here shall" be administered as therein provided, where the certificates are found in a safe deposit box in the state, and the trustees reside there and the home office of the trust, where alone the certificates can be transferred and new ones issued, is there. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

²⁰ They are subject to a succession tax in a state where all the trust property is located and all the trustees reside, and where the business office of the trust and its books are, and the certificates of its stock can alone be transferred, even though the owner is a nonresident and the certificates themselves are not within the state. *Peabody v. Treasurer & Receiver General*, 215 Mass. 129, 102 N. E. 435.

A note belonging to a nonresident at the time of his death and secured by an assignment of a deposit book in a real estate trust, formed in Massachusetts and whose property consisted chiefly of Massachusetts real estate, is subject to a succession tax under the

laws of Massachusetts. *Kinney v. Treasurer & Receiver General*, 207 Mass. 368, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912 A 902, 93 N. E. 586. As to this case see *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941.

²¹ As to the situs of shares of corporate stock, see § 3434, *supra*.

²² *Gleason v. McKay*, 134 Mass. 419; *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710.

"Such shares, if they can be said to be property, are not the property of the copartnership or association, but of the individual partners or shareholders." *Gleason v. McKay*, 134 Mass. 419.

Shares which the trustees are authorized to issue to subscribers do not belong to the association but to the trustees, for the benefit of themselves and their associates, and hence the trustees may continue to sell them after they have conveyed the trust property to a corporation formed to take it over. *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710.

That this is true of corporate stock, see § 3418, *supra*.

²³ See § 3425, *supra*.

itself, but is merely evidence of its ownership.²⁴ And a person may be a stockholder in such an association although no certificate has ever been issued to him.²⁵

§ 6087. — Transfer of shares. Usually the shares in such an association are transferable,²⁶ and a provision making them transferable is generally held to be legal, even though the association is a partnership.²⁷ The interest of a shareholder in the trust property represented by the certificates of stock may be sold, mortgaged or pledged by the owner like any other kind or species of property either directly, or by an assignment of the certificate, when so provided by the agreement under which the association is formed.²⁸ And the mortgagee²⁹ or pledgee³⁰ of such certificates acquires such an equitable lien or interest as a court of equity will recognize and protect.

²⁴ *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710.

²⁵ *Yeaman v. Galveston City Co.*, 106 Tex. 389, Ann. Cas. 1917 E 191, 167 S. W. 710.

²⁶ *United States. Brown v. Gilman*, 4 Wheat. 255, 4 L. Ed. 564.

Illinois. Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439.

Iowa. Swan v. Davenport, 119 Iowa 46, 93 N. W. 65; *Joseph v. Davenport*, 116 Iowa 268, 269, 89 N. W. 1081.

Maine. Smith v. Virgin, 33 Me. 148.

Massachusetts. Taber v. Breck, 192 Mass. 355, 78 N. E. 472; *Gleason v. McKay*, 134 Mass. 419; *Tyrell v. Washburn*, 6 Allen 466.

New York. Rice v. Rockefeller, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658, 31 N. E. 907, rev'g 56 Hun 516, 9 N. Y. Supp. 866.

Pennsylvania. Kountz's Appeal, 204 Pa. 432, 54 Atl. 316.

Wisconsin. Durkee v. Stringham, 8 Wis. 1.

²⁷ *Idaho. Spotswood v. Morris*, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 1094.

Illinois. Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439.

Massachusetts. Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355; *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808; *Hoadley v. Essex*, 105 Mass. 519.

New York. Troy Iron & Nail Factory v. Corning, 45 Barb. 231.

Texas. Industrial Lumber Co. v. Texas Pine Land Ass'n, 31 Tex. Civ. App. 375, 72 S. W. 875.

Partnerships with transferable shares are legal in Massachusetts. *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213; *Phillips v. Blatchford*, 137 Mass. 510.

²⁸ *Durkee v. Stringham*, 8 Wis. 1. See also *Brown v. Gilman*, 4 Wheat. (U. S.) 255, 4 L. Ed. 564; *Smith v. Virgin*, 33 Me. 148.

In *In re Moss' Appeal*, 43 Pa. St. 23, it was held that where shares of stock pledged to the trustees were sold on default and purchased for the benefit of the company, they were virtually extinguished.

²⁹ *Durkee v. Stringham*, 8 Wis. 1.

³⁰ See *Minot v. Burroughs*, 223 Mass.

One to whom shares have been transferred by a member or by operation of law may maintain a bill in equity against the trustees to compel them to issue a new certificate to him.³¹ And where the stock is transferable only on the books of the association, a transferee may compel such a transfer,³² as he could do in the case of corporate stock.³³

Purchasers of shares in a real estate trust "are not in the position of purchasers of real estate for value without notice. They can stand in no better position in this regard than the trustees. The evidence of interest in the trust being a certificate, which in form of transfer resembles personal property, purchasers for value do not stand on the same footing as purchasers of real estate by deed in reliance upon the record. It is subject in this regard to the infirmities of transfers of personal property."³⁴

A shareholder who transfers his shares ceases to be a member of the association, and the transferee takes his place.³⁵ And since a transfer carries with it dividends earned, but not declared, the transferor cannot thereafter maintain a bill in equity against the members of the association in respect to accumulated profits. Dividends declared and placed to the credit of the transferor before the transfer belong to him, however, and he may recover them.³⁶

The legislature may regulate sales and purchases of the stock of

595, 112 N. E. 620, where shares of trust stock were pledged by the managers of an underwriting syndicate with the trustees in order to prevent them from reducing the dividends on such stock, under an agreement giving the trustees authority to cancel the stock and reduce the capital of the trust to that extent on certain contingencies, and where it was held that the trustees were entitled to a decree canceling the pledged stock on the happening of the contingencies.

³¹ An executor of a deceased stockholder may maintain such a bill. *Breck v. Barney*, 183 Mass. 133, 66 N. E. 643.

³² *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237, 30 Am. St. Rep. 658,

31 N. E. 907, rev'g judgment 56 Hun 516, 9 N. Y. Supp. 866.

³³ See § 3817 et seq., supra.

³⁴ So their interests are subject to a trust in the land in favor of third persons, of which the trustees were chargeable with notice when the property was conveyed to them. *Bisbee v. Mackey*, 215 Mass. 21, 102 N. E. 327.

³⁵ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472. See also *Smith v. Virgin*, 33 Me. 148; *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

As to the effect of transfers of corporate stock, see § 3767 et seq., supra.

³⁶ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

In *In re Moss' Appeal*, 43 Pa. St. 23, an agreement was held not to con-

such associations.³⁷ And an excise tax may be levied upon transfers of their stock under constitutional authority to impose and levy reasonable duties and excises upon "commodities" within the state.³⁸

An agreement by an employee of such an association to sell his shares to another member when he leaves the employ of the company, and by such other member to buy them, may be specifically enforced when otherwise valid.³⁹

§ 6088. — Dividends. Generally speaking, dividends belong to the persons who hold the legal title to the stock when the dividend is declared. But a stockholder guaranteeing the payment of dividends may agree that no dividends shall be paid on his stock until arrears of dividends at the specified rate have been paid on the stock of the other shareholders.⁴⁰ Where stock is transferred, dividends declared and placed to the credit of the transferor before the transfer belong to him, and those declared after the transfer belong to the transferee, in the absence of any agreement on the subject.⁴¹ If the articles of association make its books and the certificates of stock prima facie evidence of the ownership of the shares, dividends may be paid to those who by the books and certificates appear to be the legal owners of the shares.⁴²

Shares of stock pledged to the trustees, which have been sold on default and purchased for the benefit of the company, are not to be considered on the distribution of the proceeds of the sale of trust property to the stockholders, nor are shares which have been released to the company.⁴³

Dividends may be set off against a debt due from shareholder to the association.⁴⁴

stitute a sale of stock, but merely an executory contract to sell it, and the vendees were held not entitled to a dividend thereon, or to enforce specific performance in view of the great lapse of time.

See also § 3700, *supra*.

³⁷ Opinion of the Justices, 196 Mass. 603, 85 N. E. 545.

³⁸ Opinion of the Justices, 196 Mass. 603, 85 N. E. 545.

³⁹ For a case dealing with the construction and enforcement of such a provision, see *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

⁴⁰ *In re Moss' Appeal*, 43 Pa. St. 23.

⁴¹ See § 6087, *supra*.

⁴² *In re Moss' Appeal*, 43 Pa. St. 23. See also § 3797, *supra*.

⁴³ *In re Moss' Appeal*, 43 Pa. St. 23.

⁴⁴ *In re Moss' Appeal*, 43 Pa. St. 23. See also § 3697, *supra*.

The rules applicable in determining whether dividends declared on the stock of a corporation belong to the life tenant or remainderman,⁴⁵ will be applied in case of dividends on the stock of such an association.⁴⁶ So stock dividends which are additions to capital stock will go to the remainderman.⁴⁷ And cash dividends earned after the death of the testator will go to the life tenant in states where this would be true in the case of cash dividends on corporate stock.⁴⁸

A shareholder may maintain a bill in equity against the trustees to compel an accounting and the payment of dividends where they wrongfully refuse or fail to divide accrued net profits.⁴⁹

In a Massachusetts case it was held that trustees were not guilty of a breach of duty in accepting a pledge of stock from the managers of an underwriting syndicate as a condition of not reducing the dividend rate on the stock, where it was believed that this would enable the managers to market additional stock, and obviate the necessity for cutting the dividend rate in the immediate future, although they "probably could not agree to pay dividends or in any way to bind their hands so as not to act at all times for the interests of the trust."⁵⁰

§ 6089. — Investment of trust funds in shares. The propriety of the act of a trustee under a will in investing the trust funds in the preferred shares of a trust of this character has been upheld on the ground that the safeguards surrounding the rights and liabilities of the shareholders through restrictions imposed by the trust agreement under which the shares were issued and the character of the property (principally shares of public service corporations operating in the state and other corporations subsidiary thereto) were such as to warrant the making of the investment.⁵¹ However, this holding would

⁴⁵ See § 3711 et seq., *supra*.

⁴⁶ *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171.

⁴⁷ This was held to be true of a stock dividend to make up arrears of dividends on preferred stock, which was not declared out of net earnings. *Gardiner v. Gardiner*, 212 Mass. 508, 99 N. E. 171.

⁴⁸ *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

⁴⁹ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

⁵⁰ *Minot v. Burroughs*, 223 Mass. 595, 112 N. E. 620.

⁵¹ *Kimball v. Whitney*, — Mass. —, 123 N. E. 665, upholding an invest-

seem to be so controlled by the terms and character of the particular trust as not to afford a general rule concerning the propriety of such investments.

§ 6090. Rights and duties of majority shareholders against minority. A provision giving a majority in interest of the certificate holders the right to control the management of the trust is not to be construed as permitting an arbitrary and inequitable exercise of the power of the majority towards the minority, but such provisions are enforceable only when the majority exercises an honest discretion in the interests of all. And one who holds a majority of the stock of an association cannot shelter himself behind this power in order to escape his own obligations to it.⁵²

§ 6091. Duration and termination of trust. The duration of the trust and of the association is often expressly fixed by the agreement creating it.⁵³ If not so fixed, the rule that where the evident purpose of a trust is the accomplishment of a particular object, the trust will terminate as soon as that object has been accomplished, may apply.⁵⁴

It is generally provided in trust agreements of this character that the death of a member shall not work a dissolution of the association,⁵⁵

ment in preferred shares of Massachusetts Electric Companies.

⁵² Hogg v. Hoag, 107 Fed. 807, aff'd 154 Fed. 1003.

⁵³ **United States.** Eliot v. Freeman, 220 U. S. 178, 55 L. Ed. 424.

Illinois. Venner v. Chicago City R. Co., 258 Ill. 523, 101 N. E. 949.

Massachusetts. Dana v. Treasurer & Receiver General, 227 Mass. 562, 116 N. E. 941; Attorney General v. New York, N. H. & H. R. Co., 198 Mass. 413, 84 N. E. 737.

Minnesota. Venner v. Great Northern R. Co., 117 Minn. 447, 136 N. W. 271.

New York. In re Bunker's Estate, 77 Misc. 320, 137 N. Y. Supp. 104.

⁵⁴ See Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439,

where it was held that the record did not present a case for the application of this rule. And see Troy Iron & Nail Factory v. Corning, 45 Barb. (N. Y.) 231.

As to this rule generally, see Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900. And see standard works on Trusts.

⁵⁵ Taber v. Breck, 192 Mass. 355, 78 N. E. 472; Phillips v. Blatchford, 137 Mass. 510; Oliver's Estate, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

Where the articles under which a trading association is organized contemplate the continuance of the business in the same manner by the remaining members, notwithstanding the death or withdrawal of a member, it is not dissolved by the death of a

and, when such is the case, the shares of a deceased member pass to his distributees or legatees,⁵⁶ who acquire such interest, and only such interest, in the property of the association as the decedent had.⁵⁷ Of course if the shares are transferable, a transfer of his shares by a member will not work a dissolution.⁵⁸

It is sometimes provided that upon the death of a trustee, the partnership may be terminated at the election of any shareholder and the assets distributed among the beneficiaries in proportion to their holdings.⁵⁹ Even where the agreement creates a partnership, it cannot be terminated at the will of a member, contrary to the terms of such agreement.⁶⁰

§ 6092. Rights, powers and duties of trustees—In general. So far as trustees in general are concerned, reference should be made to treatises on the laws of Trusts as to the powers, duties, etc., of trustees. In this connection the law as decided by the courts in relation to trusts of the kind herein considered will be noticed, together with a mere reference to a few rules governing trustees generally.

The rights, powers and duties of the trustees with respect to the trust properly depend, of course, upon the purposes for which the association was formed, as evidenced by the instrument creating the trust. So the provisions of the trust agreement will govern in determining the purposes for which the trustees may expend the money of the association,⁶¹ and their right to sell the trust property.⁶²

member, and the rule that a surviving partner cannot be held liable on a contract thereafter made without his assent or knowledge by another partner, has no application. *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

A provision making the shares transferable is evidence of an intent that such death shall not result in a dissolution. *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439.

⁵⁶ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

⁵⁷ *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

⁵⁸ *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439.

⁵⁹ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

⁶⁰ *Hossack v. Ottawa Development Ass'n*, 244 Ill. 274, 91 N. E. 439; *Troy Iron & Nail Factory v. Corning*, 45 Barb. (N. Y.) 231.

⁶¹ In *Quimby v. Tapley*, 202 Mass. 601, 89 N. E. 167, it was held that a hotel was the property of the association, on which its money could properly be expended by the trustees.

⁶² In *Gould v. Head*, 41 Fed. 240, it was held that under a trust for the acquisition, management and disposition of the stock of certain classes of

Ordinarily it is the duty of a trustee to reduce to possession the property which is to constitute the trust fund, and in this behalf to use the vigilance which a prudent grantee would deem to be necessary for his own protection in perfecting the title.⁶³

The usual rules as to the construction, operation and effect of contracts apply to contracts made by the trustees in carrying on the business of the association.⁶⁴ Where a contract modifying a previous one states in terms that it is made by the trustees in behalf of assenting certificate holders only, they may sue to enforce the original contract in behalf of those certificate holders who did not assent to the modification.⁶⁵

Provisions of the trust deed as to the control of the trust property may be waived by mutual consent of the parties. And trustees who consent to acts of shareholders in this respect may be held to have thereby waived the right to object that they were inconsistent with the declaration of trust.⁶⁶

Trustees to whom the legal title to land is conveyed without consideration take it subject to infirmities in title of which the grantor has knowledge.⁶⁷ And substituted trustees, who take the legal title

corporations, the trustees had authority to sell to third persons stock so acquired. The contrary was held to be true in an earlier opinion on application for a temporary injunction in the same case. *Gould v. Head*, 38 Fed. 886.

⁶³ *Hogg v. Hoag*, 107 Fed. 807, aff'd 154 Fed. 1003.

See standard works on Trusts.

⁶⁴ In *Humphreys v. New York, L. E. & W. R. Co.*, 121 N. Y. 435, 24 N. E. 695, it was held that even if the trustees of a car trust had authority to bind nonconsenting certificate holders by a modification of a lease, they did not attempt to do so, but that the modification in terms applied only to assenting certificate holders, and that the original lease continued in force as to those who did not assent.

Where trustees agreed to apply all moneys coming into their hands as

such, "after first paying therefrom all taxes and current expenses of said property and trust," to the payment of the claim of a former trustee against the estate, it was held that the term "current expenses" meant ordinary expenses, and did not include money expended in the erection of a fireproof office building and otherwise improving the trust property. *Taylor v. Davis*, 110 U. S. 330, 28 L. Ed. 163.

As to the validity of notes signed and endorsed by a treasurer employed by the trustees under authority conferred by the by-laws of an organization constituting a trust, see § 6094, *infra*.

⁶⁵ *Humphreys v. New York, L. E. & W. R. Co.*, 121 N. Y. 435, 24 N. E. 695.

⁶⁶ *Smith v. Moore*, 129 Mass. 222.

⁶⁷ They are chargeable with notice that the grantor holds it subject to a

to real estate, according to the terms of the trust declaration, by selection and qualification, without any new conveyance or new consideration, take the same estate held by their predecessors charged with the same infirmities, and are affected with notice of such infirmities given to their predecessors.⁶⁸

A trustee who is also a stockholder may mortgage or convey his interest in the trust property represented by his certificates of stock.⁶⁹ And a trustee may purchase the stock of a shareholder, provided he acts in good faith and with fairness.⁷⁰

§ 6093. — Power to act singly and power of majority. As far as co-trustees generally are concerned, the general rule is that they must all co-operate in the exercise of the powers of their office and cannot act separately or independently of each other, except that one trustee may, in many things, act as agent of all the trustees, especially in case of emergency, and except that there may be ratification of the act of one trustee by his associates in the trust.⁷¹ In the absence of a provision in the trust instrument to the contrary, all the trustees must deliberate and advise in making contracts or conveyances, or at least have full notice and opportunity to do so, although a majority may decide.⁷²

§ 6094. — Delegation of powers. A trustee cannot delegate his powers, or substitute others to act in his stead, without an express

resulting trust in favor of a third person. *Bisbee v. Mackay*, 215 Mass. 21, 102 N. E. 327.

See standard works on Trusts.

⁶⁸ *Bisbee v. Mackay*, 215 Mass. 21, 102 N. E. 327.

⁶⁹ *Durkee v. Stringham*, 8 Wis. 1.

⁷⁰ *Swan v. Davenport*, 119 Iowa 46, 93 N. W. 65. And see standard works on Trusts.

⁷¹ See *Ubhoff v. Brandenburg*, 26 App. Cas. (D. C.) 3, and see *Perry, Trusts and Trustees* (6th Ed.), § 411 et seq.

"In the absence of any provisions to the contrary in the trust instrument,

the trustees must act jointly in matters involving the exercise of their discretion. In purely ministerial matters or in an emergency, to preserve the fund, one may act alone. Courts uphold stipulations in the trust deed giving a majority of the trustees or less power to act even in matters involving discretion, but even in such cases it has been held that those not acting are entitled to notice of the contemplated action and an opportunity to be heard." *Wrightington, Unincorporated Associations*, § 46.

⁷² *Heard v. March*, 12 Cush. (Mass.) 580.

provision to that effect in the instrument creating the trust, or the consent of all of the beneficiaries.⁷³ However, of course he may appoint agents to perform purely ministerial functions.⁷⁴ Even though the agreement constitutes a partnership and not a trust, where the declaration of trust filed in the office of the city and with the secretary of state and kept on file in the office of the organization provides that the trustees shall have power to employ such attorneys, agents, clerks and a treasurer, and to fix the duties to be performed by them "as they may deem expedient," and pursuant thereto the trustees adopt a by-law prescribing among the treasurer's duties that of making, signing and endorsing promissory notes in the name and behalf of the organization, such by-law being also on file at the organization's office, and the officers and some of the shareholders knew that notes of the organization had been signed or endorsed by the treasurer and an examination of the books or even casual attention to the affairs of the organization would have disclosed the facts and how the business was conducted, the organization is bound by the act of the treasurer in signing and endorsing promissory notes of which the organization received the proceeds, nor, in such case, are members of the organization relieved from liability as such on these obligations by reason of the fact that they were not original subscribers or officers and their certificates of shares, while referring to the declaration of trust, made no reference to the by-laws.⁷⁵

§ 6095. — Liability on contracts. Ordinarily, in the absence of special limitations, the trustees bind themselves personally by their contracts with third persons.⁷⁶ And this liability survives their

Provisions in trust agreement, see § 6074, *supra*.

⁷³ *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932; *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336, 340. See, generally, *Perry, Trusts and Trustees* (6th Ed.), § 402 et seq.; *Beach, Trusts and Trustees*, §§ 548, 549.

⁷⁴ See *Perry, Trusts and Trustees* (6th Ed.), § 404; *Beach, Trusts and Trustees*, § 548.

⁷⁵ *Horgan v. Morgan*, — Mass. —, 124 N. E. 32.

⁷⁶ *Taylor v. Davis*, 110 U. S. 330, 28 L. Ed. 163; *Johnson v. Leman*, 131 Ill. 609, 7 L. R. A. 656, 19 Am. St. Rep. 63, 23 N. E. 435; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083. See also *Connally v. Lyons & Co.*, 82 Fed. 664, 27 Am. St. Rep.

death.⁷⁷ The holder of a personal obligation incurred by them in the management of the trust property may sue them personally thereon,⁷⁸ at law,⁷⁹ and the judgment in such an action will run against them personally.⁸⁰ "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the

935, 18 S. W. 799.

"As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him." Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163.

A note signed in the name of the association by its treasurer, as provided in the by-laws, and not signed by the trustees, is not the obligation of the trustees, and they cannot be held personally liable on it. Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

Where the subject of the trust is a contract which is assigned to the trustees under an agreement whereby they are to perform it, they become personally liable thereon. Credit Mobilier of America v. Com., 67 Pa. St. 233.

As to the liability of trustees on their contracts generally, see Gill v. Carmine, 55 Md. 339; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911;

Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170. And see standard works on Trusts.

⁷⁷ Johnson v. Leman, 131 Ill. 609, 7 L. R. A. 656, 19 Am. St. Rep. 63, 23 N. E. 435.

⁷⁸ Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083. See also cases cited in the preceding and following notes. And see standard works on Trusts.

The beneficiaries are not necessary parties to such an action. Connally v. Lyons & Co., 82 Tex. 664, 27 Am. St. Rep. 935, 18 S. W. 799.

⁷⁹ Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083. See also Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009. And see, generally, Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170, and standard works on Trusts.

⁸⁰ Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

The only legally possible judgment must run against them as individuals. Judgment cannot be entered against them as trustees. Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

trustee. * * * If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."⁸¹

If a creditor has a remedy against the trustee individually and also a remedy against the estate, he may pursue both of these remedies simultaneously or successively, although, of course, he is entitled to but one satisfaction of his claim.⁸²

The trustees may relieve themselves from personal liability by provisions to that effect in their contracts,⁸³ especially where the agreement creating the trust so provides.⁸⁴ But a provision in the trust

⁸¹ Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163. See also Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911, and standard works on Trusts.

⁸² See § 6103, *infra*.

⁸³ Taylor v. Davis, 110 U. S. 330, 28 L. Ed. 163. See also § 6073, *supra*.

So trustees were held not to be personally liable on a note signed by them as trustees, and providing: "We as trustees but not individually promise to pay." Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49.

In Cook v. Gray, 133 Mass. 106, it was held that the provisions of certain contracts made it plain that it was the intention of the trustees to bind the company, as they had authority to do, and not to bind themselves personally.

In New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111, where property was conveyed in trust to receive the rents, issues and profits thereof, and after paying taxes, assessments and other charges thereon, to apply the residue to the use of a named beneficiary, the court states the rule as follows: "The general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contract unless authorized to do so by the terms of the

instrument creating the trust. Upon such contracts he is personally liable, and the remedy is against him personally. But there are exceptions to this general rule. When a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure."

See, generally, on this subject, Gill v. Carmine, 55 Md. 339; Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170.

⁸⁴ Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

"The parties may agree that the trustee shall not be held personally on the contract, but that only the trust estate itself shall be chargeable with the debt. In such a case, if the instrument creating the trust author-

deed relieving them from personal liability does not prevent them from contracting personally in respect to the business of the association, if they see fit to do so.⁸⁵

§ 6096. — Liability for torts. The trustees may be held personally responsible for their torts or the torts of their agents or servants in the management of the trust property.⁸⁶ And as a rule the trust estate cannot be held liable therefor at law.⁸⁷ But the trustees may be relieved from liability and liability imposed upon the trust estate by a provision to that effect in the trust deed.⁸⁸ The trust agreement often contains a provision that the trustee shall be liable only for his own wilful default or neglect. Such provisions are valid,⁸⁹ and "wilful default" means "intentionally making away with the trust property, and a wilful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a wilful violation of duty. The difference between neglect of duty by a trustee and a wilful neglect or default by a trustee is not unlike the difference between the liability of one who is bound to exercise due care and the liability of the owner of land to a trespasser."⁹⁰

§ 6097. — Liability for acts of co-trustee. "A trustee is not responsible for the acts or misconduct of a co-trustee in which he has not joined, or to which he does not consent, or has not aided or made

izes this to be done, or even when it does not give such authority, if the circumstances are peculiar, the trustee is not bound, but the fund is." *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911.

⁸⁵ *Holt v. Blake*, 47 Me. 62; *American Mining & Smelting Co. v. Converse*, 175 Mass. 449, 56 N. E. 594.

⁸⁶ *Sleeper v. Park*, — Mass. —, 122 N. E. 315; *Falardeau v. Boston Art Students' Ass'n*, 182 Mass. 405, 65 N. E. 797; *Parmenter v. Barstow*, 22 R. I. 245, 63 L. R. A. 227, 47 Atl. 365. See also *Curry v. Darr*, 210 Mass. 430, 97 N. E. 87; *Wright v. Caney River R. Co.*, 151 N. C. 529, 19 Ann. Cas. 384, 66 S. E. 588; *Parmenter v. Barstow*,

22 R. I. 245, 63 L. R. A. 227, 47 Atl. 365.

⁸⁷ See *Parmenter v. Barstow*, 22 R. I. 245, 63 L. R. A. 227, 47 Atl. 365, and see *Wright v. Caney River R. Co.*, 151 N. C. 529, 19 Ann. Cas. 384, 66 S. E. 588, where the trust was for the benefit of creditors, and it was held that the trust estate could be held liable at law where the cestuis que trustent were parties to the trust deed and took part in the management and control of the business.

⁸⁸ *Prinz v. Lucas*, 210 Pa. 620, 60 Atl. 309.

⁸⁹ See treatises on Trusts.

⁹⁰ *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381.

possible by his own neglect.”⁹¹ But he is required to inform himself of the various business transactions involved in the execution of the trust, and cannot discharge his duty or escape liability by surrendering the substantial or entire control of the business to a co-trustee, nor can he properly delegate his authority to him or to a third person, or be indifferent when the course of affairs is distinctly disadvantageous to the beneficiaries.⁹²

§ 6098. — Indemnity of trustee. “Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof.”⁹³ “The general rule is, that the expenses of properly administering a trust are a lien, on behalf of the trustee, on the estate in his hands, and he will not be compelled to part with his control of that estate until such expenses are paid.”⁹⁴ It is better to insert a provision as to indemnity in the trust agreement.⁹⁵

§ 6099. — Liability to certificate holders or beneficiaries. The trustees are bound to exercise reasonable skill, prudence and judgment in the discharge of their duties, and are liable to the shareholders for losses resulting from their failure to do so.⁹⁶ And in accounting for

⁹¹ *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932. See, generally, *Perry, Trusts and Trustees* (6th Ed.), § 415 et seq.

“A trustee is not liable for misconduct of a co-trustee if he himself is blameless. It is not necessarily negligent to allow the co-trustee to handle funds alone, but he cannot sleep on his trust.” *Wrightington, Unincorporated Associations*, § 44.

⁹² *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932.

⁹³ *Taylor v. Davis*, 110 U. S. 330, 28 L. Ed. 163. See, generally, *Gill v. Carmine*, 55 Md. 339, and *Perry, Trusts and Trustees* (6th Ed.), § 485.

⁹⁴ *Johnson v. Leman*, 131 Ill. 609, 7 L. E. A. 656, 19 Am. St. Rep. 63, 23 N. E. 435. See, generally, *Gill v. Carmine*, 55 Md. 339; *New v. Nicol*, 73 N. Y. 127, 29 Am. Rep. 111; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911, and standard works on Trusts.

⁹⁵ See § 6073, *supra*.

⁹⁶ *Hogg v. Hoag*, 107 Fed. 807, *aff'd* 154 Fed. 1003; *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932, where certain settlements made by the trustees of a real estate trust under advice of counsel were held not to be so injudicious and unwarranted that they should be personally charged with the amounts

their administration of property admittedly received by them the burden of proof in this respect is upon them.⁹⁷ It has been said that they "are liable for their fidelity to the trust, and for all profits made in the business, in substantially the same manner that a board of directors is liable to the stockholders in an incorporated company."⁹⁸ But they will not be charged with the proportion of a loss represented by the shares of a member who participated in their misconduct from which such loss resulted.⁹⁹ And, if under the terms of the agreement, the majority in interest of the certificate holders are in every respect to control the trust, and the trustee is not to exercise any of the powers vested in him without their consent, he cannot be held responsible for impairments of the fund due to their neglect.¹ Nor can a trustee be held to account for payments made by him in accordance with the directions or with the sanction of an executive committee to whom the management of the affairs of the association is intrusted by the agreement.² Sometimes the liability is limited by the trust agreement to cases of "wilful default."³

§ 6100. — Attachment of property of trust as property of trustee.

In one case in Massachusetts a purchaser of land caused an agreement and declaration of trust to be executed between himself as trustee and four beneficiaries, to develop and dispose of land to which title might be acquired. Four friends of the trustee signed the agreement, each subscribing a certain sum, but they paid no money and took no part in the affair except forthwith to indorse to the trustee the four certificates of beneficial interest issued in their names.

paid, but it was further held that they would be personally charged with another unwarranted payment, and with a loss due to a foreclosure of a mortgage on the trust property.

See also *Holmes v. McDonald*, 226 Ill. 169, 80 N. E. 714, rev'g 128 Ill. App. 560, where the trustees of an unincorporated savings bank association were held liable for failure to use proper care in investing and depositing the funds of the depositors.

See standard works on Trusts.

⁹⁷ *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932.

⁹⁸ *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527.

⁹⁹ *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932.

¹ *Hogg v. Hoag*, 107 Fed. 807, aff'd 154 Fed. 1003.

² *Hogg v. Hoag*, 107 Fed. 807, aff'd 154 Fed. 1003.

³ See § 6096, *supra*.

The land scheme was a failure and a mortgage thereon was released upon a part of the land and that part was attached by a personal creditor of the trustee. It was held that since the trustee was both trustee and sole beneficiary, the legal and equitable title merged in him; that the trust became a mere form; and that the land was subject to levy for his individual debts.⁴

§ 6101. — Right of trustee to apply to court for directions. In cases of doubt as to what the law is and what their conduct ought to be under it, trustees in general are entitled to instruction and direction from the court.⁵ But, as a rule, the court will instruct only in regard to matters which trustees cannot properly decide on their own responsibility.⁶ Such instructions and orders, obtained without collusion or fraud, will protect trustees from loss, whatever may be the event.⁷

§ 6102. — Compensation of trustee. Trustees are entitled to a reasonable compensation for their time, trouble and skill in executing the trust,⁸ and the compensation is sometimes fixed by statute in case of trustees generally. In business trusts, the trust agreement generally makes some provision as to the compensation of the trustees,⁹ in which case of course such provision controls.

§ 6103. — Actions by or against trustee. The trustee of an unincorporated voluntary association may sue in his own name on an obligation running to it as the trustee of an express trust.¹⁰ And even where the association is a partnership, suits involving the affairs of the association may be brought by or against the trustees as such, without joining the other members, where the articles of copartnership or the statutes so provide.¹¹

⁴ *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909.

⁵ *Perry*, Trusts and Trustees (6th Ed.), § 476a. See also *Bullard v. Attorney General*, 153 Mass. 249, 26 N. E. 691.

⁶ *Beach*, Trusts and Trustees, § 463.

⁷ *Perry*, Trusts and Trustees (6th Ed.), § 476a.

⁸ *Perry*, Trusts and Trustees (6th Ed.), § 918; *Beach*, Trusts and Trustees, § 735.

⁹ See § 6079, *supra*.

¹⁰ *Laughlin v. Greene*, 14 Iowa 92. See also standard works on Trusts.

¹¹ But in order that a person contracting with the copartnership may bring himself within such a provision,

The shareholders may compel the trustees to account by a bill in equity brought for that purpose, under the same circumstances that any trustee might be compelled to do so.¹² And they may also maintain a bill to enjoin a transfer of the property of the association in violation of the terms of the trust agreement.¹³ Where the trustee is also the active manager of the business of the association, a bill charging him with breaches of trust in both capacities is not multifarious.¹⁴ But a cause of action against members of an executive committee associated with the trustee in the management of the business, charging them with conspiracy in connection with the trustee to effect an illegal transfer of the trust property, is not germane to such a bill, where they are charged with no duty with respect to such transfers.¹⁵

The beneficiaries are not necessary parties defendant in actions on contracts or torts of the trustees, where the trustee represents the beneficiaries in all things relating to their common interest in the property.¹⁶

§ 6104. — Removal of trustee. A trustee may be removed by a court of equity for cause, regardless of the absence of any provision in the trust agreement in regard thereto.¹⁷ However, the general

he must aver that the trustees, made defendants, are sued as such. *Farmers' Mutual v. Reser*, 43 Ind. App. 634, 88 N. E. 349.

See standard works on Trusts and Partnership.

¹² *Moody v. Flagg*, 125 Fed. 819; *Ashley v. Winkley*, 209 Mass. 509, 95 N. E. 932; *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472; *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213. See also *Holmes v. McDonald*, 226 Ill. 169, 80 N. E. 714, rev'g 128 Ill. App. 560.

A stockholder may compel them to account where they act corruptly and in bad faith in disposing of the trust property. *Gould v. Head*, 41 Fed. 240.

¹³ A stockholder may restrain them from disposing of the trust property

corruptly and in bad faith. *Gould v. Head*, 41 Fed. 240.

In *Moody v. Flagg*, 125 Fed. 819, it was held that a provision for the transfer of the trust property on a vote of a majority of the stockholders contemplated a sale of the trust property for cash, and hence that a bill to enjoin a transfer to a corporation in return for shares of its stock was not demurrable.

¹⁴ *Moody v. Flagg*, 125 Fed. 819.

¹⁵ *Moody v. Flagg*, 125 Fed. 819.

¹⁶ See *Kenison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 813, and textbooks on the law of Trusts.

¹⁷ See *Perry*, Trusts and Trustees (6th Ed.), § 275.

Removal of trustee under corporate trust deed, see § 1335.

practice is to specifically provide in the trust agreement as to the power, or power and method, of the shareholders to remove trustees,¹⁸ although too broad a provision in regard thereto may convert the trust into a partnership.¹⁹

§ 6105. Liability of trust estate. Ordinarily persons contracting with the trustee have no lien on the estate in his hands, but their only remedy is against him personally.²⁰ Nor can the trust property be held under an attachment nor sold upon an execution for the trustee's personal debts.²¹ But under some circumstances creditors may have satisfaction in equity out of the trust estate for debts incurred by the trustee for its benefit.²² Under the English doctrine, which has been adopted by some of the courts in this country, creditors may reach the trust property when, and only when, the trustees are entitled to be indemnified therefrom. Under such circumstances they are substituted for the trustees and stand in their place.²³ Under

¹⁸ See § 6077, *supra*.

¹⁹ See § 6061, *supra*.

²⁰ *Johnson v. Leman*, 131 Ill. 609, 7 L. R. A. 656, 19 Am. St. Rep. 63, 23 N. E. 435. See generally *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911, and standard works on Trusts.

This is true of persons employed by the trustee. And it is true although the trustee died during the course of the employment and the trust property was subsequently transferred to another person acting as trustee, and though it was afterwards decided by the courts that neither was a lawfully appointed trustee. *Johnson v. Leman*, 131 Ill. 609, 7 L. R. A. 656, 19 Am. St. Rep. 63, 23 N. E. 435.

²¹ *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87. But see § 6100, *supra*.

It cannot be reached in a suit in the nature of an equitable attachment. *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083.

That the trustees bind themselves personally by their contracts with third persons, see § 6095, *supra*.

²² *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *Mayo v. Moritz*, 151 Mass. 481, 24 N. E. 1083. See also *Mathews v. Stephenson*, 6 Pa. 496, and see generally *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911. Compare *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832, 26 Atl. 375, where liability of trust estate is stated very broadly.

In *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009, it was held that the property was not of such a nature that it could not be sold by the means open to the court.

In *Wright v. Caney River R. Co.*, 151 N. C. 529, 19 Ann. Cas. 384, 66 S. E. 588, a trust estate was held liable in an action at law for negligence of the trustee, the court distinguishing between active and passive trusts.

²³ See *Frost v. Thompson*, 219 Mass.

this rule, "the plaintiff's right to obtain satisfaction of his debts is worked out through the trustees' right to indemnity, and hence depends upon the state of the account between the trustees and the trust fund."²⁴ Other American courts, however, have held that the creditor's right is a primary and original one which exists independently of any right on the part of the trustee to be indemnified, and hence is independent of the state of the account between the trustee and the trust fund.²⁵ Under either rule, "the basis of recovery is that the plaintiff holds an obligation incurred by trustees in the course of their duty in administering the trust fund out of which satisfaction is sought by the plaintiff."²⁶

Of course the trust agreement may create primary liability on the part of the trust estate,²⁷ as where it is provided that the estate only, and not the trustee, shall be liable.²⁸ But a provision in a contract made by the trustee with a third person that its members shall be exempt from personal liability thereunder does not necessarily give the other party to the contract a lien on the property of the association or any part of it. "Whether it does or not depends upon the intention of the parties, as expressed by the language of the instru-

360, 106 N. E. 1009. And see generally as to this doctrine, *Hewitt v. Phelps*, 105 U. S. 393, 26 L. Ed. 1072; *King v. Stowell*, 211 Mass. 246, 98 N. E. 91; *Dunham v. Blood*, 207 Mass. 512, 93 N. E. 804; *Mason v. Pomeroy*, 151 Mass. 164, 7 L. R. A. 771, 24 N. E. 202; *Norton v. Phelps*, 54 Miss. 467; *Clopton v. Gholson*, 53 Miss. 466, and standard works on Trusts.

The right of the trustee to claim reimbursement from funds in his hands for proper expenditures made by him in the execution of the trust "is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the trust property itself." *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911.

²⁴ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

²⁵ See *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. And see generally *Kupferman v. McGehee*, 63 Ga. 250; *Wyllie v. S. J. Collins & Co.*, 9 Ga. 223, and standard works on Trusts.

²⁶ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

²⁷ See standard textbooks on the law of Trusts, and see *Sears, Trust Estates as Business Companies*, §§ 46, 47.

Where a note refers to a declaration of trust which specifically provides for a lien, the holder of the note is entitled to one. *Bank of Topeka v. Eaton*, 100 Fed. 8.

²⁸ *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87; *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911.

ment itself, or gathered from that and attendant circumstances. If the instrument itself declares the lien, it needs no aid from a court of equity. If the instrument evinces a purpose on the part of the parties that a lien should exist, but falls short of its creation, proceeding upon the maxim that equity considers as done that which ought to be done, the courts will carry out the just purposes of the contracting parties. But it must appear that a lien was intended or promised upon some specific property.²⁹

The equitable interest of the certificate holders in the trust property can be reached, if at all, only through proceedings in equity,³⁰ and cannot be attached by creditors of the association in an action at law.³¹ And this is particularly true where the agreement creating the trust limits the liability of the shareholders to the amounts subscribed by them, and provides that they shall not be liable to any third person.³² "This is because the relations of the cestuis que trust to their contracts are only equitable, and do not subject them to proceedings in a court of common law, and the property held in trust is charged with equities which hold it aloof from the jurisdiction of a court of law to take it and apply it in payment of debts created by the trustees. Such debts, if proper charges upon the trust estate, can be paid from it under authority of a court of equity."³³

If a creditor has a remedy against the trustee individually and also a remedy against the estate, he may pursue both of these remedies simultaneously or successively,³⁴ although, of course, he is entitled to but one satisfaction of his claim. So the fact that he sues the trustees at law and recovers a personal judgment against them is not an election to hold them to the exclusion of the trust estate, and

²⁹ *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875, where it was held that there was no lien.

³⁰ *King v. Stowell*, 211 Mass. 246, 250, 93 N. E. 91; *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

³¹ *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

Actions at law must be brought against the trustees. *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

³² *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

³³ *Hussey v. Arnold*, 185 Mass. 202, 70 N. E. 87.

³⁴ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

"The rule of election allows the simultaneous employment of remedies not mutually repugnant, looking toward the satisfaction of a single claim." *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

does not prevent him from subsequently proceeding against it.³⁵ "The two positions are not inconsistent, or if inconsistent, it is not a defense open to the defendants."³⁶

Sale of the title of the trustees pursuant to a decree of a court of equity will not affect the rights of purchasers of interests from the trustees.³⁷

§ 6106. Liabilities of associates or shareholders. If the trust agreement creates a partnership, the rights and obligations of the members as shareholders are those defined by the established rules of law applicable to ordinary partnerships.³⁸ They cannot escape such liability on the ground that they were misled by the appearance and language of the certificate of "non-assessable" "shares of stock" to believe that the organization was a corporation and that they did not realize that they were associating themselves as a partnership, where they paid no attention to the conduct of the organization's business.³⁹ Where the trust agreement creates a partnership, the members of the association are liable for its debts as in the case of partners generally.⁴⁰ Nor can they relieve themselves from such liability by an agreement to that effect among themselves, or between themselves and the trustees appointed to manage the affairs of the concern;⁴¹ although such an agreement

³⁵ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009. In the above case the question whether a personal judgment against certain trustees who were also shareholders in the association would be a bar to a suit in equity against all of the shareholders as partners, or to reach and apply the assets of the association in payment of the obligation as a partnership debt, was referred to, but not decided.

³⁶ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

³⁷ *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

³⁸ *Horgan v. Morgan*, — Mass. —, 124 N. E. 32. See also *Williams v. Milton*, 215 Mass. 1, 102 N. E. 355.

³⁹ *Horgan v. Morgan*, — Mass. —, 124 N. E. 32.

⁴⁰ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472; *Phillips v. Blatchford*, 137 Mass. 510; *Whitman v. Porter*, 107 Mass. 522; *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875.

As to whether such an agreement creates a trust or a partnership, see § 6061, *supra*.

⁴¹ *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875.

Members of a trading association cannot relieve themselves from liability to creditors by any agreement among themselves. So members who

may be binding as between themselves so as to prevent the remaining members from suing members who withdraw for contribution.⁴² If the agreement constitutes a pure trust and not a partnership, the beneficiaries are not personally liable for the debts or liabilities of the trustee,⁴³ in ordinary cases.

Of course the trust agreement may give the trustees authority to bind the stockholders, personally.⁴⁴ On the other hand, a provision in a contract made by such an association, with a third person that its members shall be exempt from personal liability thereunder, and that he shall look alone to the common holdings of the association for indemnity is valid and binding on him.⁴⁵

As in other cases, a partner who pays a firm debt is entitled to contribution from the other partners,⁴⁶ the amount for which each is liable being determined, as between themselves, by the number of shares which he holds.⁴⁷ And this liability extends to the estate of a deceased shareholder, where it is provided that the death of a member shall not work a dissolution of the association.⁴⁸

withdraw or transfer their shares, as they are authorized to do by the constitution, remain liable for all existing debts of the association, and may be liable for subsequent debts to creditors who knew of their membership and have no notice of their withdrawal. *Tyrrell v. Washburn*, 6 Allen (Mass.) 466.

⁴² In *Tyrrell v. Washburn*, 6 Allen (Mass.) 466, it was held that members of a trading association who retired or transferred their shares were thereby relieved from liability to the other members in respect to the corporate debts, although they still remained liable to the creditors for all existing debts, and might be liable for subsequent debts to creditors who knew of their membership and had no notice of their withdrawal.

⁴³ *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L. R. A. 252, 75 N. W. 911.

⁴⁴ *Cook v. Gray*, 13th Mass. 106.

⁴⁵ There is no rule, either of law or of public policy, which forbids the making of such a contract. *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 Tex. Civ. App. 375, 72 S. W. 875.

Where a note given by the trustee as such refers to the declaration of trust, the payee is bound by a provision in the deed that the trustees shall have no power to bind the shareholders personally, and cannot hold them personally liable. *Bank of Topeka v. Eaton*, 100 Fed. 8, aff'd 107 Fed. 1003.

⁴⁶ *Phillips v. Blatchford*, 137 Mass. 510; *Whitman v. Porter*, 107 Mass. 522. See also *Smith v. Virgin*, 33 Me. 148. And see standard works on Partnership.

⁴⁷ *Taber v. Breck*, 192 Mass. 355, 78 N. E. 472.

⁴⁸ Where the trust agreement creates a partnership, and provides that the death of the member of the association shall not work a dissolution of it, nor entitle his personal rep-

The usual rules as to the rights of separate creditors of a partner to reach his interest in the firm property apply.⁴⁹

§ 6107. Rights of creditors or claimants—In general. Unless otherwise stipulated in the contract—or perhaps merely in the trust agreement—creditors may sue the trustee personally in an action at law on contracts made with him.⁵⁰ So the trustee ordinarily may be sued personally for torts committed in the execution of the trust by himself or his agents.⁵¹ However, a trustee is not personally liable on a contract where it is otherwise stipulated therein.⁵² No right of action exists against the beneficiaries personally, in case of a pure trust.⁵³ Whether the trust estate may be held liable, and whether if liability exists it may be enforced by an action at law as distinguished from a suit in equity, has already been noticed.⁵⁴

§ 6108. —Priorities between creditors and beneficiaries. The rights of the beneficiaries in the trust fund or property in the hands of the trustee is ordinarily subordinate to the rights of creditors who have an enforceable claim against the trust estate,⁵⁵ although, if the claim of the creditor is merely against the trustee, the rights of the beneficiaries are superior.

§ 6109. Applicability of rules against perpetuities and restraints on alienation. Generally the duration of these trusts is expressly limited to a period within the rule against perpetuities, as a matter of caution,⁵⁶ although the few adjudicated cases hold that under

representatives to an account, but that they shall simply succeed to the right of the deceased to the certificate and the shares it represents, subject to the declaration of trust, the estate of a deceased shareholder is liable to contribute to the other partners for debts incurred after his decease and before the executor has done any act by which he becomes a partner in the testator's place. *Phillips v. Blatchford*, 137 Mass. 510.

⁴⁹ *Clagett v. Kilbourne*, 66 U. S. 346,

17 L. Ed. 213; *Oliver's Estate*, 136 Pa. St. 43, 9 L. R. A. 421, 20 Am. St. Rep. 894, 20 Atl. 527; *Kramer v. Arthurs*, 7 Pa. 165. See also standard works on Partnership.

⁵⁰ See § 6095, *supra*.

⁵¹ See § 6096, *supra*.

⁵² See § 6095, *supra*.

⁵³ See § 6106, *supra*.

⁵⁴ See § 6105, *supra*.

⁵⁵ See *Rice v. Lane*, 166 Mass. 233, 44 N. E. 133.

⁵⁶ See *Eliot v. Freeman*, 220 U. S.

ordinary circumstances such a trust does not come within the rule against perpetuities. For instance, in an Illinois case it was held that a real estate trust does not violate the rule against perpetuities, where the land is to be conveyed to the trustees to be subdivided and improved by them and then sold, and the time of sale is left wholly to their discretion, and no trust term is created, so that a conveyance of the land or any part of it at any time would be no violation of the trust, since in such case there are persons in being at the creation of the estate who are capable of conveying an immediate and absolute estate in fee in possession.⁵⁷ In holding that another real estate trust did not violate the rule against perpetuities the Massachusetts Supreme Court said: "Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose, and where the income is not accumulated but is distributed as it accrues, and where the land is to be sold free of trusts at the will of the association, and where the whole equitable interest in the trust is at every moment vested absolutely in those who are at that moment shareholders, and never can become vested in any other persons save by act of the absolute owners or by operation of law upon their property, and not by force of any limitation contained in the deed of trust, the equitable interests so vested being also constantly vendible by their several owners without let or hindrance, as well as subject to their debts and passing like other property upon death by virtue not of the deed of trust but of the general laws governing the disposition of the property of decedents, withdraws no property from commerce, and is not within the reason or the terms of what is called the rule against perpetuities. The trust involves no future limitations, no restraint upon alienation, and no accumulation either of income or of principal. The provisions by which

178, 55 L. Ed. 424; *Venner v. Chicago City R. Co.*, 258 Ill. 523, 101 N. E. 949; *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941; *Attorney General v. New York, N. H. & H. R. Co.*, 198 Mass. 413, 84 N. E. 737; *Venner v. Great Northern R. Co.*, 117 Minn. 447, 136 N. W. 271; *In re*

Bunker's Estate, 77 N. Y. Misc. 320, 137 N. Y. Supp. 104.

As to rule against perpetuities in general, see *Gray, Rule Against Perpetuities*.

⁵⁷ *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

the trust fund may be at some time held for the benefit of persons not shareholders at its inception, and who may become such at a period more remote than that allowed by the rule, are not future limitations made by the trust deed in the sense in which the word 'limitation' is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in whom the whole equitable estate was absolutely vested at the inception of the trust, that shareholder will not take his interest by virtue of a limitation in the trust deed, but because of his succession by virtue of the general principles of law to the property of the original shareholder. The new shareholder, with reference to the rule, is in the same situation as a person who, after the expiration of all lives which were in being when a fee or an estate tail was created, and of a further period of twenty-one years, takes the fee by the operation of the law which makes property vendible by or descendible from the owner, and not by virtue of a limitation in the instrument which created the fee. The entire ownership is never for a moment uncertain, nor unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest. * * * The provision in the present trust, that the shareholders are not to have any interest or title in the trust property itself, and no right to call for partition, and that the share shall be personal property, is not a restraint upon alienation, since the alienation of the legal and the equitable ownerships are provided for. It does not appear, and cannot be assumed, that the persons who organized the association and became its shareholders had title to the land held by the trustees. Their whole interest comes through the shares which are vendible without restraint." 58

58 *Howe v. Morse*, 174 Mass. 491, 55 N. E. 213.

In the above case the court refused to express any opinion upon contentions that the interests of the shareholders were real estate, and hence that an agreement not to make parti-

tion might be open to objection under the law as to perpetuities and restraints upon alienation, on the ground that these were matters which upon any theory could not make the whole trust illegal.

A pledge of trust shares to the trustees does not violate the rule against perpetuities or the rule against restraints on alienation where the equitable interest in the shares is at all times in the pledgors, and is not to be changed except when the legal title is to revert in them under the terms of the pledge, or the certificates are to be canceled on default, and where there is no interest to spring into being at some period beyond the time fixed by law for the benefit of an uncertain person or class.⁵⁹

§ 6110. Applicability of Statute of Uses. Where it is necessary for the trustees under a real estate trust to hold the legal title to the property in order to exercise the powers and perform the duties prescribed by the trust deed, the Statute of Uses has no application, and this is true even though the shareholders have power to remove trustees and fill vacancies, and to direct and control the action of the trustees, where they have not attempted to exercise such powers.⁶⁰ Nor does it apply to a case where the trustees have themselves a beneficial interest in property conveyed to them and are something more than the holder of the mere nominal title.⁶¹

§ 6111. Applicability of Bankruptcy Act. It has been held that such a trust is an "unincorporated company" within the meaning of the Bankruptcy Act, and may be adjudicated a bankrupt as such.⁶²

§ 6112. Governmental control.—In general. In another volume of this work, the governmental control of corporations has been stated at some length.⁶³ So far there has been very little legislation specially applicable to the trusts herein considered. In Massachusetts the statute provides that "the trustees of a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of par-

⁵⁹ *Minot v. Burroughs*, 223 Mass. 595, 112 N. E. 620.

⁶⁰ *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246.

⁶¹ The New York statute which vests the nominal title to property in

the beneficiary does not apply under such circumstances. *King v. Townsend*, 141 N. Y. 358, 36 N. E. 513.

⁶² *In re Associated Trust*, 222 Fed. 1012.

⁶³ See §§ 4356-4573.

icipation or shares, shall file a copy of such written instrument or declaration of trust with the commissioner of corporations and with the clerk of every city or town in which such association has a usual place of business." If the trust owns or controls a majority of the stock of a railroad, street railway, gas company, or electric light company, the trustees are also required to file annually with the commissioner of corporations and with the board having jurisdiction of such company a statement showing the number of shares of such company owned or controlled by them and the stockholders of record on the books of such company in whose names such shares are held.⁶⁴ The statute of that state requiring the recording of the names and residences of persons doing business under a fictitious name expressly provides that it shall not apply to any firm, partnership, joint stock company or association the business of which is conducted or transacted by trustees under a written instrument or declaration of trust, provided the names of such trustees with a reference to such instrument or declaration of trust are filed as provided in the act.⁶⁵

As we have seen, the legislature may regulate transfers of the stock of such associations and impose an excise tax thereon.⁶⁶ Taxation of the property or shares therein is noted in another section.⁶⁷

§ 6113. — Regulation of business by sister state. The provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states undoubtedly authorizes trust estates to do business in sister states as a matter of right and without the burdens, or similar burdens, imposed upon foreign corporations.⁶⁸ In this connection, a Vermont decision throws considerable light on this question. In that case an information was filed in Vermont against an agent of a partnership organized under the laws of New York for selling bonds without a license. No license was required of resident firms, but a

⁶⁴ Acts 1909, c. 441.

⁶⁵ Acts 1908, c. 316; Acts 1907, c. 539.

⁶⁶ See § 6087, *supra*.

⁶⁷ See § 6115, *infra*.

⁶⁸ See, as tending to support the

statement in the text, *Shirk v. La Fayette*, 52 Fed. 857; *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 27 Fed. 146; *Roby v. Smith*, 131 Ind. 342, 15 L. R. A. 792, 31 Am. St. Rep. 439, 30 N. E. 1093.

license was required by statute in case of firms "organized under the laws of another state." The statute was held unconstitutional as discriminating in favor of firms organized in Vermont so as to violate the equal protection of the law's provision of the Federal Constitution.⁶⁹ In a Minnesota case, a statutory joint stock company (express company) organized in New York but not incorporated so as to be a corporation, was sought to be examined as to its business by the Minnesota Railroad and Warehouse Commission, but it refused to answer as to its business and property outside the state and as to its interstate business. The Supreme Court of Minnesota held that "the defendant not being a corporation, but a partnership, has the same right to do business in this state without its permission, and free from its control and visitatorial power, as any other individual or partnership," and that while questions as to its property within the state were proper on the theory that it was a common carrier whose business was affected with a public interest and therefore subject to public control and regulation, yet information could not be demanded as to its property outside the state or its interstate business. The court said that "if it were a corporation, domestic or foreign, the state, by its authorized officers, would have the undoubted right to require full information as to all of its business; for the state has the right to know what its creature, or one of another sovereignty that it permits to come into the state, is doing. If, however, it be not a corporation endowed by law with special franchises and rights, but a partnership existing by virtue of the contract of its members, then the state possesses none of the visitatorial powers which it may exercise over corporations."⁷⁰ That these decisions would apply equally well if a business trust was involved instead of a partnership or statutory joint stock company, is undoubted.

§ 6114. — Regulations applicable only to corporations or prohibiting conducting of certain business except by corporation. It has already been noted at some length that regulations applicable only

⁶⁹ State v. Cadigan, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714, 50 Atl. 1079. ⁷⁰ State v. United States Exp. Co., 81 Minn. 87.

to corporations, and excluding individuals or unincorporated associations, violate the equal protection clause of the Federal Constitution where there is no reasonable basis for the discrimination, but not where there is a reasonable basis for the discrimination.⁷¹ Vice versa, the imposition of conditions upon unincorporated associations engaged in a certain business which are not imposed on corporations engaged in the same business is not objectionable as class regulation where based on a reasonable distinction involving the public welfare,⁷² nor objectionable as conferring a monopoly.⁷³ So far as the trusts now being considered are concerned, no decision has been found in regard to whether there is unjust discrimination in favor of a corporation or vice versa. However, it is held that the legislature may in effect prohibit, by regulation, one class, composed of unincorporated associations, partnerships and individuals, from conducting a business such as that of a building and loan association, and permit the conducting of such business by corporations.⁷⁴ So statutes limiting banking business to incorporated associations have been upheld as constitutional,⁷⁵ as have like statutes confining insurance business to corporations.⁷⁶ In South Dakota, however, it is held that the legislature cannot deprive a citizen of the right to carry on the business of banking and confer the exclusive privilege of carrying on such business upon corporations organized as provided by an act of the legislature, on the theory that the business of banking is not a franchise.⁷⁷

§ 6115. Taxation. It has been urged as one of the advantages of trusts over corporations that taxation peculiar to corporations, including state organization and franchise taxes, are avoided. In a case decided by the Supreme Court of the United States in 1911

⁷¹ See § 4404.

⁷² *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291, 100 N. W. 358.

⁷³ *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291, 100 N. W. 358.

⁷⁴ *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291, 100 N. W. 358.

⁷⁵ *State v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 970; *Weed v. Bergh*, 141 Wis. 569, 25 L. R. A. (N.

S.) 1217, 124 N. W. 664. See also *Noble State Bank v. Haskell*, 219 U. S. 113, 55 L. Ed. 117.

⁷⁶ *Com. v. Vrooman*, 164 Pa. St. 306, 25 L. R. A. 250, 44 Am. St. Rep. 603, 30 Atl. 217.

⁷⁷ *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756, 51 N. W. 858.

it was held that these trusts did not come within the provisions of a federal statute taxing the income of corporations and joint stock associations "organized under the laws of the United States or of any state or territory," on the theory that "it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law."⁷⁸ In a case decided by the Supreme Court of the United States in 1919, the question involved was whether a Massachusetts trust was a "joint stock company or association" within the Federal Income Tax Law of 1913, imposing such a tax on "every corporation, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." In the Circuit Court of Appeals it had been held that, while a Massachusetts trust is not necessarily an "association" in the statutory sense, yet, the income of the trust not being taxable under the provision taxing all persons, corporations or associations acting in any fiduciary capacity on the net income "of the person for whom they act," on the theory that the particular trust did not make the income belong to the beneficiaries of the trust before distribution, the trust was an "association" for the purpose of imposing an income tax.⁷⁹ In reversing the judgment below, the Supreme Court, however, held that the trust did "not fall under any familiar conception of a joint stock association, whether formed under a statute or not," and that "it would be a wide departure from normal usage to call the beneficiaries here a joint stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint stock association within the meaning of the act unless all trustees with discretionary powers are such. * * * We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to

⁷⁸ *Elliot v. Freeman*, 220 U. S. 178, 55 L. Ed. 424, construing Act of Congress, Aug. 5, 1909, § 38; 36 Stat. 11, 112.

⁷⁹ *Crocker v. Malley*, 250 Fed. 817.

turn them into an association by uniting their contrasted functions and powers, although they are in no proper sense associated.”⁸⁰

In construing a Massachusetts statute as to taxation, it was held in that state that a so-called trust may constitute a partnership for the purpose of taxation although the trust agreement expressly provides that neither the beneficiaries nor the trustees are to be liable individually for the debts of the trust, where the trust agreement in fact constitutes a partnership.⁸¹ Of course, the legislature may provide that a trust which is not a partnership shall be treated as a partnership for the purposes of taxation.⁸²

In Massachusetts, three justices of the Supreme Judicial Court gave as their opinion on a tax question that an excise tax cannot be imposed upon the mere exercise of a natural right, and that the right to sell shares in a voluntary association organized and doing business without legislative authority derived from any state or country, whose only business or function is of a kind that does not call for legislative regulation; but the majority of the court were of the opinion that an excise tax may be imposed and levied upon a privilege which is the exercise of a natural right.⁸³

Shares of a trust are generally taxable as personal property and not as real property.⁸⁴ In one Massachusetts case, it was held that where a declaration of trust creates a partnership and the trust property is mostly real and personal estate situated in another state, a person dying in Massachusetts possessed of a share of the trust does not die possessed of real estate to the extent to which the assets of the trust at the time of his death consisted of real estate, and of personal property to the extent to which those assets consist of personal property at the time, so far as a succession tax is concerned, but that

⁸⁰ *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. —, 2 A. L. R. 1601.

⁸¹ *Williams v. Boston*, 208 Mass. 497, 94 N. E. 808. See also *Williams v. Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355.

⁸² *Williams v. Inhabitants of Milton*, 215 Mass. 1, 5, 102 N. E. 355.

⁸³ *Opinion of the Justices*, 196 Mass. 603, 85 N. E. 545.

⁸⁴ *Priestley v. Treasurer & Receiver General*, 230 Mass. 452, 120 N. E. 100, and see § 6086, *supra*, as to nature of shares as personal property.

In this case, however, in case of one of the three trusts involved, it was held that a partnership was created and that the interest of a shareholder was real estate or an interest therein so as to be subject to a succession tax.

where the trust agreement provides that upon the termination of the trust all the partnership real estate shall be converted into personalty and that during the existence of the partnership the property of the trust shall be represented by transferable certificates, all the property of the trust must be regarded as having been converted into personalty from the beginning to constitute one fund, and the certificates representing the shares in the trust are personal property, so that such shares held by a testator domiciled in Massachusetts at the time of his death are subject to a legacy and succession tax in Massachusetts.⁸⁵ Taxation of shares of stock in trusts is further considered in another section of this chapter.⁸⁶

In Massachusetts, the effect of the state income tax law is that property held in trust in a sister state by a trustee there taxed therefor is exempt from taxation to a cestui que trust residing in Massachusetts, but an income tax levied by statute on income of a Massachusetts beneficiary from securities which are not taxable and are not taxed to the trustee under the laws of a sister state where the trust property is located, the trustee resides and the trust was created, is not unconstitutional as a taking of property without due process of law.⁸⁷

A leading writer on this subject, after reviewing many cases relating to taxation of trusts in general, reaches the following conclusions: "It seems impossible to find any case maintaining or attempting to maintain the proposition that the legal and equitable interest in the same property may both be taxed, at least where trustee and beneficiaries reside in the same state. On the contrary, all theory as to this being lawful as to capital stock and shares of stock of a corporation is that they are distinct and independent properties, there being a legal interest in the former and a legal interest in the latter, that is to say, diverse legal interests in different things. In a trust there is a legal interest and its dependency, an equitable interest. If the

⁸⁵ *Dana v. Treasurer & Receiver General*, 227 Mass. 562, 116 N. E. 941, writ of error dismissed, 250 U. S. 220, 63 L. Ed. —, on the ground that the decision of the state court was reviewable by writ of certiorari only.

⁸⁶ See § 6086, *supra*.

⁸⁷ *Maguire v. Tax Commissioner*, 230 Mass. 503, 120 N. E. 162. See also *Hunt v. Perry*, 165 Mass. 287, 43 N. E. 103.

latter is destroyed a beneficiary ceases to be, but the property resumes the status it had before the subsidiary interest began. Under the doctrine of limitation of power in the state to tax property only within its jurisdiction, * * * it is not perceived how a resident cestui que trust may be taxed as to his interest in a foreign trust, if no tangible property thereof is found at his domicile. His interest is not a chose in action. It is an interest merely represented by another who holds the legal title and lawful possession. If he could be taxed on tangible personal property elsewhere lawfully holden and taxable, then too he would be taxable on real estate in another state. As to intangibles the rule *mobilia sequuntur personam* should not override the legal title or make it have a double application. Therefore, it may be said that in the state, where both trustee and cestui que trust reside one tax is all that may be imposed; and if they reside in different states the tax is imposed where the property is held.''⁸⁸

⁸⁸ Sears, Trust Estates as Business Companies, § 114.

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A

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II. BY ACT OF LEGISLATURE.

III. BY EXPIRATION OF TIME.

IV. IPSO FACTO DISSOLUTION.

V. VOLUNTARY DISSOLUTION.

VI. BY DECREE OF COURT.

VII. GROUNDS FOR FORFEITURE.

VIII. WAIVER OF FORFEITURE AND ESTOPPEL AGAINST STATE.

IX. ACTIONS BY MINORITY STOCKHOLDERS.

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Commencing on page 2936 of volume 3 and extending to page 3972 of volume 4 is the chapter entitled "Directors, Other Officers and Agents." Included therein is the liabilities of officers, including directors, all in volume 4, not only to the corporation itself but also to creditors of the corporation, to third persons for torts, and on contracts of the corporation.

- I. IN GENERAL.
- II. TO CORPORATION.
- III. TO CREDITORS INDEPENDENT OF STATUTE.
- IV. TO PURCHASERS OF STOCK FROM OFFICERS.
- V. TO THIRD PERSONS DIRECTLY INJURED BY TORTS OF.
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Receivers

The chapter on "Receivers" is in volume 8, commencing on page 8825. Receivers appointed in connection with dissolution proceedings are considered in the next chapter on "Dissolution," from page 9236 to 9263. Some general rules applicable to receivers are also stated in the chapter on "Insolvency" in volume 8. Receivers of foreign corporations are treated of in the chapter on "Foreign Corporations" in volume 8.

- I. IN GENERAL.
- II. APPOINTMENT IN GENERAL.
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- VI. EFFECT OF.
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There is no separate chapter on the subject of Sales. However, sales of corporate property and sales to corporations are considered in volume 2 in the chapters relating to acquisition of property by, and transfers of property of, corporations. They are also considered in volume 7 on Combination, etc., of Corporations in so far as the effect of a sale of all the property of a corporation is concerned as relating both to the selling and purchasing corporation and the creditors of the seller. "Transfer" is a broader term than "sale" and hence reference should also be made to the index heads Transfer of Property and Transfer of Stock. Sale of stock is indexed herein so far as the sale part is concerned (see subdivision in volume 6, page 6493, entitled Contracts for the Sale of Shares) while matters relating to transfers of stock in general and on the books of the corporation are indexed under the head Transfer of Stock. Reference should also be made to the index head Purchases.

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[References are to pages.—Vol. 1, pp. 1-1114; Vol. 2, pp. 1115-2223; Vol. 3, pp. 2224-3361; Vol. 4, pp. 3362-4672; Vol. 5, pp. 4673-5986; Vol. 6, pp. 5987-7321; Vol. 7, pp. 7322-8604; Vol. 8, pp. 8605-9898; Vol. 9, pp. 9899-10622.]

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Stock

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- I. IN GENERAL.
- II. DEFINITIONS AND KINDS.
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- IV. ISSUANCE AND CANCELLATION OF CERTIFICATES.
- V. INCREASE OF CAPITAL STOCK.
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- I. IN GENERAL.
- II. POWERS AND RIGHTS OF STOCKHOLDERS.
- III. ACTIONS BY.
- IV. AS PARTIES TO ACTIONS.
- V. CONSENT OF TO ACTS OF DIRECTORS OR OFFICERS.
- VI. DEALINGS WITH CORPORATION.

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- I. IN GENERAL.
- II. FORM OF.
- III. WHO MAY SUBSCRIBE.
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- V. REVOCATION OR WITHDRAWAL. ..
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- VIII. CONDITIONAL SUBSCRIPTIONS AND CONDITIONS PRECEDENT.
- IX. SUBSCRIPTION ON SPECIAL TERMS OR UPON CONDITIONS SUBSEQUENT.
- X. FRAUD IN PROCURING.
- XI. WITHDRAWAL, RELEASE AND DISCHARGE OF SUBSCRIBERS.
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- XIII. FORFEITURE AND SALE OF SHARES TO ENFORCE PAYMENT.
- XIV. CALLS OR ASSESSMENTS ON UNPAID SUBSCRIPTIONS.
- XV. TRANSFER OF UNPAID SUBSCRIPTIONS.
- XVI. AS CONDITION TO CORPORATE EXISTENCE OR COMMENCEMENT OF BUSINESS OR ENFORCEMENT OF SUBSCRIPTIONS.
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- I. IN GENERAL.
- II. OF CORPORATION AND ITS BUSINESS.
- III. OF SHARES OF STOCK, SHAREHOLDERS AND BONDHOLDERS.
- IV. EXEMPTIONS FROM TAXATION.
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Chapter 37 in volume 3, beginning at page 2564, is entitled "Ultra Vires." It treats of the effect of contracts or acts beyond the powers of a corporation. In the next following chapter the effect of illegal or prohibited contracts is considered. In order to determine whether a contract or act is within the power of a corporation, turn to the index head Powers of Corporations.

- I. IN GENERAL.
- II. WHO MAY URGE.
- III. CONTRACTS EXECUTORY ON BOTH SIDES.
- IV. CONTRACTS EXECUTED ON ONE SIDE.
- V. CONTRACTS FULLY EXECUTED ON BOTH SIDES.

[References are to pages.—Vol. 1, pp. 1-1114; Vol. 2, pp. 1115-2223; Vol. 3, pp. 2224-3361; Vol. 4, pp. 3362-4672; Vol. 5, pp. 4673-5986; Vol. 6, pp. 5987-7327; Vol. 7, pp. 7328-8604; Vol. 8, pp. 8605-9898; Vol. 9, pp. 9899-10522.]

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